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STONE V. POWELL: THE FOURTH AMENDMENT EXCLUSIONARY RULE, FEDERAL HABEAS CORPUS AND THE FULL AND FAIR STANDARD

INTRODUCTION

The exclusionary rule is a principle of judicial self-restraint formulated to enforce the fourth amendment. It is perhaps modern society's most trying test of commitment to constitutional tenets. Ever-increasing crime rates make it extremely difficult to justify the rule's exclusion of reliable and often critical evidence from a criminal trial solely on the basis of the broad and pliant language of the fourth amendment.[1] The exclusion of relevant evidence at the trial level often results in an acquittal for lack of proof. Even assuming that evidence clears this first hurdle and is admitted by the trial court, an equally onerous result may be the reversal of conviction on direct appeal because of the prejudicial consideration of unconstitutionally obtained evidence. Critics of the rule urge that society as a whole should not be penalized for the mistakes or abuses of a few law enforcement officials.

When the exclusionary rule is first given effect on federal habeas corpus review of a state judgment, justification is particularly troublesome because the social costs of applying the rule are aggravated by the finding of prejudicial constitutional error. The mere availability of federal habeas corpus to state prisoners is, according to its opponents, contrary to the notion of state sovereignty.[2] Despite the state adjudication of a prisoner's consititutional claim, he may still collaterally attack the validity of that state conviction on federal habeas corpus if he has exhausted all other state remedies. Not only does this reflect a basic mistrust of state court systems, critics continue, but also the assumption that federal courts are better qualified to decide constitutional issues.[3] When a state prisoner asserts by federal habeas corpus a violation of his fourth amendment rights predicated upon the trial court's admission of unconstitutionally obtained evidence, the tension between federal and

1. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated . . . .U.S. CONST. amend. IV.

2. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 263-66 (1973) (Powell, J., concurring).

3. *See* Stone v. Powell, 428 U.S. 465 n.35 (1976).

state court systems is greatest, and the cooperation between them at its least.

Despite drawbacks, the exclusionary rule and federal habeas corpus were explicitly formulated to serve a variety of social values. Although the efficacy of both devices to accomplish such values is sometimes subject to dispute there can be no doubt as to the importance of their objectives. When the exclusionary rule and federal habeas corpus are utilized by a state prisoner in a collateral attack on a state judgment their joint function is to protect individual citizens from unwarranted intrusions of personal privacy deemed reprehensible to a free society. Proposals to restrict the availability of this form of judicial relief must, in face of such a fundamental objective, clearly demonstrate its ineffectiveness or pose a workable alternative. Conventional notions of social values such as the reliability of the guilt-determining process and the interests of federalism, it is submitted, should not take precedence over this constitutional purpose absent a showing of such inefficiency.[4]

Growing dissatisfaction with the effect that both federal habeas corpus for state prisoners and the fourth amendment exclusionary rule have upon the adequacy and finality of state adjudications[5] culminated this past term in the decision of *Stone v. Powell*.[6] Proponents of expansive state authority have long perceived the modern convergence of political power in the federal government as violative of the reserve clause of the tenth amendment. Federal habeas corpus relief for state prisoners can be regarded as yet another infringement of the sovereign state's right to govern its citizens without federal interference. *Stone* is a decision following

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4. It may ultimately be shown that permitting a federal habeas corpus remedy after an abortive state proceeding may jeopardize some goals more desirable than the vindication of the constitutional rights of state prisioners. Since forfeiture of constitutional rights is at stake, such goals ought to be unmistakably clear, and it must be satisfactorily demonstrated that they are attainable only through the sacifice of constitutional guarantees. But until goals of this nature evolve out of the process of analysis, it does not seem appropriate, in light of the problems and purposes thus far exposed, to permit forfeiture of the right to seek federal habeas corpus relief merely because of an abortive state proceeding. Reitz, *Federal Habeas Corpus: Impact of An Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1373 (1961). *Cf.* Bivens v. Six Unknown Federal Agents, 403 U.S. 388, 416 (1971) (Burger, C. J., dissenting).

5. Kaufman v. United States, 394 U.S. 217, 231 (Black, J., dissenting); Bivens v. Six Unknown Federal Agents, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting); Schneckloth b. Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring).

6. 428 U.S. 465 (1976).

the recent pattern of cases expressing revitalized concern for the role that states should play in our federal system of government.[7]

Mr. Justice Powell, who wrote the majority opinion in *Stone v. Powell* began with the premise that the federal remedy of habeas corpus is only available to vindicate infringements of *constitutional* rights.[8] The exclusionary rule itself was not considered a constitutional guarantee by the *Stone* majority but only a "judicially created means of effectuating the rights secured by the fourth amendment."[9] The exclusionary rule must, therefore, justify its continued existence and application by incurring on balance more social benefits than detriments. Although "the primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates fourth amendment rights,"[10] available statistical evidence on the deterrent effect of the rule is inconclusive at best.[11] Furthermore, the social cost of excluding "typically reliable and often the most probative information bearing on the guilt or innocence of the defendant"[12] is extremely burdensome. Additional resources must then be expended not only to duplicate judicial effort but also to investigate alternative sources of proof that oftentimes are less reliable and probative than the illegally obtained evidence excluded by the rule. Therefore, the majority in *Stone* comes down on the side of conditioning the impact of the exclusionary rule when used by a state prisoner as the basis for a federal writ of habeas corpus. With this in mind Justice Powell concluded:

> Where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim,[13] a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal,

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7. *See, e.g.*, Wainwright v. Sykes, ___ U.S. ___ , 97 S.Ct. 2497 (1977); Juidice v. Vail, ___ U.S. ___ , 97 S.Ct. 1211 (1977); Rizzo v. Goode, 423 U.S. 362 (1976); Francis v. Henderson, 425 U.S. 536 (1976); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Hicks v. Miranda, 422 U.S. 322 (1975); Preiser v. Rodrequez, 411 U.S. 475 (1973); Perez v. Ledesma, 401 U.S. 82 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); Younger v. Harris, 401 U.S. 37 (1971).

8. 428 U.S. 465, 475-81 (1976).

9. *Id.* at 482.

10. *Id.* at 486.

11. *Id.* at 492 n.32.

12. *Id.* at 490.

13. *See* discussion at 125.

and the substantial societal costs of application of the rule persist with special force.[14]

The argument of *Stone* against the exclusionary rule in federal habeas review of state judgments is two-pronged. First, the constitutional basis of the rule is disparaged by emphasizing its deterrent function to the exclusion of other historically recognized purposes. Then the social costs resulting from application of the rule on federal habeas corpus are weighed against the diminished benefit still inhering in the exclusion of unconstitutional evidence. The first part of the *Stone* argument is directed at the exclusionary rule itself whereas the latter section deals with the effects of the rule upon society when collaterally enforced in the federal system.

A consideration of the *Stone v. Powell* argument within a historical context reveals a variety of purposes underlying the exclusionary rule other than deterrence, which continue to justify its application not only on trial or appellate levels but also on federal habeas review of state judgments. This is contrary to the impression conveyed by statements in *Stone*. Each purpose serves to achieve the objectives of the fourth amendment in a different way. The "imperative of judicial integrity" purpose, one of the first traditionally recognized, is directed at preserving respect and public confidence in government as a whole by restraining unlawful excesses of the enforcement branch of government. The protection of personal constitutional rights, another original justification for the rule, operates to insulate the individual subjected to an unreasonable search and seizure from further encroachments upon his right to privacy. The deterrent function of the rule emphasized in *Stone* is aimed at preventing future fourth amendment violations by "removing the incentive to disregard"[15] the constitutional guarantee, although the effectiveness of this general deterrence is subject to serious dispute. Whatever police deterrence does exist, however, depends upon the practical effects of the rule upon law enforcement, not the proximity of its judicial employment. Closely related to the function of deterrence is a less discernible purpose of the exclusionary rule, the educative effect also mentioned in the *Stone* majority opinion.[16] Whereas deterrence largely depends upon negative reinforcement, the educative purpose of the rule acts in a positive manner to instill constitutional values and belief systems in law enforcement officials.

14. 428 U.S. at 494-95.
15. *Id.* at 492.
16. *Id.* at 493.

Although *Stone v. Powell* correctly characterizes the exclusionary rule as a "judicially created remedy," this does not necessarily deny the constitutional dimensions of the rule. As the only practical means presently available to effectuate the prohibition of the fourth amendment, the exclusionary rule assumes a more integral and critical role than that normally occupied by a judicial evidentiary rule. Therefore, it deserves the same judicial recognition and protection as the fourth amendment itself.

The prohibition of federal habeas relief in *Stone* is prefaced by a note-worthy condition that requires the state to provide "an opportunity for a full and fair litigation" of the defendant's fourth amendment claim. This prerequisite is important because it furnishes the only means to evade the broad proscription of *Stone*. However, the interpretation of the phrase is difficult to ascertain within that context, since at least three alternative meanings are possible. The first interpretation is predicated on the general criteria established in *Townsend v. Sain*,[17] the second on a restrictive notion of federal habeas review, and the third interpretation on the procedural adequacy of the state judicial system. The last interpretation is most compelling although its effect is inconsistent with prior opinions, such as *Fay v. Noia*.[18]

MOTIVATIONAL BACKGROUND OF STONE V. POWELL

What is perhaps more perplexing than the practical effect of *Stone v. Powell* is the underlying motivation behind the decision. The prognosis of the both the exclusionary rule and/or federal habeas review of state convictions depends to a large extent upon the objective(s) towards which the *Stone* majority focused its attention. Keeping in mind the possibility that various justices may join an opinion for different reasons and the inevitable limitations that accompany any inquiry into motivations, several viable perspectives are suggested below as the principal interpretations of *Stone*.

The most obvious explanation for the *Stone* decision is a conscious rejection of the *Kaufman v. United States*[19] rationale and adoption of Mr. Justice Black's dissenting opinion in the same case, a perspective that was subsequently re-echoed by Mr. Justice Powell's concurrence in *Schneckloth v. Bustamonte*.[20] Inasmuch as

17. 372 U.S. 293 (1963).
18. 372 U.S. 391 (1969).
19. 394 U.S. 217 (1969).
20. 412 U.S. 218 (1973).

Mr. Justice Powell was also the author of *Stone*, one would reasonably expect to find some similarity between the *Kaufman-Schneckloth* minority rationales and this most recent expression. These earlier opinions were premised upon the categorization of constitutional rights according to their effect upon the integrity of the guilt-determination process.[21] In other words, since the admission of illegally obtained evidence does not taint the reliability of the finding of guilt, unlike other constitutional guarantees such as the sixth amendment right to counsel, a state conviction should not be reversed on federal habeas corpus merely because such evidence was not excluded by the trial or appellate courts. This perspective rests on the belief that it is appropriate to classify constitutional guarantees by the practical consequences they produce, and furthermore, that such distinctions are a legitimate reason for conditioning their use.

Another presumption underlying these earlier opinions was that a state judgment should not be disturbed by federal courts on habeas review unless the incarceration was unjust.[22] Injustice within this context, however was interpreted as factual innocence and did not encompass the privacy interest of the state prisoner. Inasmuch as the fourth amendment right "against unreasonable searches and seizures" was considered immaterial to the factual question of guilt, the state applicant for federal habeas relief could not be unjustly confined on that account. This line of argument was additionally buttresed by a restrictive definition of judgment finality and by a liberalized notion of comity, both of which were aimed at restraining federal habeas review of state convictions.[23]

If Mr. Justice Brennan is accurate in his assessment of *Stone v. Powell*, then the case could indeed be regarded as merely a continuation of the *Kaufman-Schneckloth* trend, the only difference being the majority status of the argument in *Stone*. In his dissent to the holding, he contended that these previous minority expressions

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> It is this element of probable or possible innocence that I think should be given weight in determining whether a judgment after conviction and appeal and affirmance should be open to collateral attack, for the great historic role or the writ of habeas corpus has been to insure the reliability of the guilt-determing process.

Kaufman v. United States, 394 U.S. at 234 (Black, J., dissenting). *See also* Schneckloth v. Bustamonte, 412 U.S. 218, 257-58 (Powell, J., concurring); Thornton v. United States, 125 U.S. App. D.C. 114, 368 F.2d 822 (1966).

22. Schneckloth v. Bustamonte, 412 U.S. at 257-58 (Powell, J., concurring).

23. *Id.* at 256-57 (Powell, J., concurring).

were still the operative reasons behind the *Stone* decision, under the pretense of interpreting the Consititution.[24] Assuming for now that the above characterization of the reasons motivating the *Stone* majority is correct, the question then arises whether only fourth amendment claims are thus to be denied habeas relief or whether all "non-guilt-related" constitutional rights will eventually be so restricted too. Responding to this query, Mr. Justice Brennan answered

> that the groundwork is being laid today in *Stone* for a drastic withdrawal of federal habeas jurisdiction, if not for all grounds of alleged unconstitutional detention, then at least for claims—for example, of double jeopardy, entrapment, self-incrimination, *Miranda* violations, and use of invalid identification procedures—that this Court later decides are not "guilt-related."[25]

Certainly, no theoretical obstacle prevents extension of the *Stone* argument to any judicial rule that is procedural or enabling in nature rather than substantive, even though the likelihood of such additional encroachments into federal habeas jurisdication probably depends more upon judicial dissatisfaction with the particular constitutional principle involved than its guilt reliability.

Another possible motivation for the *Stone* decision is simply the afore-mentioned discontent with the exclusionary rule, especially as applied to state convictions by *Mapp v. Ohio*.[26] The evolution of the rule since *Mapp* has largely been a series of exceptions to the principle of exclusion.[27] To a certain extent, this pattern is inevitable

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24. [T]he real ground of today's decision . . . would read the federal habeas corpus statutes as requiring the District Courts rountinely to deny habeas relief to state prisioners . . . because such claims are "different in kind" from other constitutional violations in that they "do not 'impugn the integrity of the fact-finding process' " . . . and because application of such constitutional strictures "often frees the guilty." . . . Much in the Court's opinion suggests that a construction of the habeas statutes to deny relief for non—"guilt-related" constitutional violations, based on this Court's vague notions of comity and federalism . . . is the actual premise for today's decision. . . . We are told that federal determination of Fourth Amendment claims merely involves "an issue that has no bearing on the basic justice of the defendant's incarceraton," . . . and that "ultimate question in the criminal process should invariably be guilt or innocence."

412 U.S. at 515-16 (Brennan, J., dissenting).

25. *Id.* at 517-18.

26. 367 U.S. 643 (1961).

27. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Janis, 428 U.S. 433 (1976); United States v. Peltier, 422 U.S. 531 (1975);

after the announcement of a general legal precept with little or no qualification made applicable to new circumstances. The pertinent question then is whether these restrictions upon the scope of the rule may be symptomatic of a trend culminating in the complete overruling of *Mapp* or whether they merely represent a fine tuning of the exclusion principle. When the *Stone* decision is considered in conjunction with *Calandra v. United States*,[28] a related opinion also written by Mr. Justice Powell that prohibited a grand jury witness from refusing to answer questions derived from evidence obtained in an unlawful search and seizure, it would appear that the rule's applications is being eaten away from opposite ends of the criminal legal system. These recent developments might well be construed as the beginning of the end for the exclusionary principle as more and more applications are excluded from its effective scope.

Mr. Justice Brennan argued in his dissent that *Mapp* was radically reinterpreted by the *Stone* holding but never explicitly overruled. Since the majority opinion also professed adherence to the earlier case, there is little doubt that it survived *Stone*. Chief Justice Burger's persistent displeasure with the exclusionary rule as reflected in his separate concurrence to *Stone*[29] also indicates the continued efficacy of the judicial principle. His and other critic's disaffection with *Mapp* apparently stems from a fundamental quarrel over the propriety of the exclusionary rule within any context, not just federal habeas corpus. Once again, if limiting the scope of the exclusionary rule was the motivation behind *Stone v. Powell*, then the issue that remains unsettled is to what extent the rule, as applied by *Mapp*, endures.

An analogous explanation for the *Stone* decision could be dissatisfaction with the scope of federal habeas corpus as interpreted by the *Brown-Noia-Townsend*[30] trilogy. Each of these cases either removed restrictions upon the availability of federal habeas review or broadly construed it's application. This expanded role further encroached upon the judicial authority of the states by subjec-

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United States v. Calandra, 414 U.S. 338 (1974); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Desist v. United States, 394 U.S. 244 (1969); Alderman v. United States, 394 U.S. 165 (1969); Fuller v. Alaska, 393 U.S. 80 (1968); Terry v. Ohio, 392 U.S. 1 (1968); Linkletter v. Walker, 381 U.S. 618 (1965). *Cf.* Stovall v. Denno, 388 U.S. 293 (1967); Chapman v. California, 386 U.S. 18 (1967); Johnson v. New Jersey, 384 U.S. 719 (1966); Tehan v. United States ex. rel. Shott, 382 U.S. 406 (1966).

28. 414 U.S. 338 (1974).

29. 428 U.S. at 496.

30. Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Brown v. Allen, 344 U.S. 443 (1953).

ting more of their convictions to federal scrutiny at even earlier stages of development. However, recent holdings of the Supreme Court have demonstrated a growing accomodation to state interests of finality and autonomy as legitimate factors to be taken into account when re-examining the judgment of a state court.[31] This principle of self-restraint, broadly termed federalism or comity, has become a threshold obstacle to scale whenever a federal court is requested to review the propriety of state action, especially when the requested relief is injunctive in nature.[32] This is also particularly relevant in the criminal domain, since that area is traditionally regarded as a local concern.[33] The deference accorded states in criminal matters by such decisions may now be extended by *Stone* to federal habeas review of state convictions as well, thereby narrowing its scope and tacitly braking the liberalizing objective(s) of the abovesaid opinions. The relevant question still remaining, however, is to what extent federal habeas review of state convictions will be limited by *Stone*. If taken at face value, the decision appears to apply only to fourth amendment claims that have not been "fully and fairly litigated" at the state level. But as noted earlier, the rationale adopted by the *Stone* majority might also be applicable to other non-guilt-related constitutional guarantees. Furthermore, the "full and fair" terminology utilized by the Court leaves room in which to maneuver due to the ambiguity of the phrase.

A final possible motivation underlying *Stone v. Powell*, upon which this note proceeds, is the combined dissatisfaction with both the exclusionary rule and federal habeas review of state convictions. From this standpoint, the decision may not presage any further restraints upon other constitutional rights of state prisoners when asserted on federal habeas corpus. Rather, discontent with the exclusionary rule and growing accomodation to state interest may have coalesced in the case to produce a result peculiar to those circumstances. Such an interpretation would not, of course, prevent further restrictions upon the fourth amendment or federal habeas relief respectively. Subsequent decisions, to be remarked on later, suggest that this may indeed be the most appropriate construction to place upon *Stone*.

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31. *See* note 7 *supra*.

32. *See, e.g.*, Rizzo v. Goode, 423 U.S. 362 (1976); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Hicks v. Miranda, 422 U.S. 332 (1975); Samuels v. Mackell, 401 U.S. 66 (1971); Younger v. Harris, 401 U.S. 37 (1971).

33. *See, e.g.*, Hicks v. Miranda, 422 U.S. 332 (1975); Samuels v. Mackell, 401 U.S. 66 (1971); Younger v. Harris, 401 U.S. 37 (1971).

PURPOSES UNDERLYING THE EXCLUSIONARY RULE

Central to an analysis of *Stone v. Powell* is a consideration of the purposes underlying the exclusionary rule. Historically, the exclusionary rule has been regarded as a device with a variety of purposes, but the deterrent function of the rule has emerged preeminent as of late.[34] Justice Powell is one of those who places primary emphasis on the deterrent function.

> The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights. Post-*Mapp* decisions have established that the rule is not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any "[r]eparation comes too late."[35] Instead, "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect."[36]

This statement is the heart of the *Stone* argument.

If the primary purpose for the exclusionary rule is the deterrence of fourth amendment violations by enforcement officials, then objective evidence rebutting the efficacy of the deterrent function lends credence to the *Stone* argument against the reconsideration of fourth amendment claims on federal habeas corpus. Deterrence has undoubtedly played a role in the development of the exclusionary rule, especially in those cases which "qualified" the scope of the rule's application.[37] Prior decisions have not, however, limited justification of the exclusionary rule solely to its deterrent objective.

The "Imperative Of Judicial Integrity"

The exclusionary rule effectuates the guarantees of the fourth amendment through a variety of avenues. *Stone v. Powell* focused upon that aspect of the rule which discourages the actual physical intrusion into one's home or effects. Yet, there can be no doubt that the exclusionary rule was also designed to "deter" the judicial recognition of unconstitutionally obtained evidence. This form of

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34. *See, e.g.*, United States v. Janis, 428 U.S. 433, 446 (1976); Michigan v. Tucker, 417 U.S. 433, (1974); United States v. Calandra, 414 U.S. 338, 347-48 (1974). *Cf.* United States v. Peltier, 422 U.S. 531, 536-39 (1975).

35. Linkletter v. Walker, 381 U.S. 618, 637 (1965).

36. Stone v. Powell, 428 U.S. 465, 486. (1976).

37. *See* notes 78 & 85 *infra* and accompanying text.

judicial self-restraint has been historically characterized as the "imperative of judicial integrity."[38] This expression signifies that courts should not sanction conduct that is unconstitutional, since they are charged with the duty of supporting and executing the Constitution as supreme law of the land.[39] The social value gained by compliance with this self-imposed "deterrence" is public trust and confidence in a judicial system dedicated to the principles upon which a free society rests.[40]

The exclusionary rule was originally given tacit recognition in *Boyd v. United States.*[41] The case centered around a court order directing the defendants to produce the invoices of certain merchandise suspected of being subject to import duties. The defendants successfully argued that the compelled production of self-incriminating evidence was unconstitutional and void. Mr. Justice Bradley, writing for the majority, relied on the judicial integrity argument when he pointed out the traditional rule never to compel evidence from a party which might tend to convict that individual of

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> The rule also serves another vital function—"the imperative of judicial integrity." . . . Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.

392 U.S. at 12-13.

39.

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.
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> This protection is equally extended to the action of the government and officers of the law acting under it. . . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

Weeks v. United States, 232 U.S. 383, 391-92, 394 (1914).

40.

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Olmstead v. United States, 277 U.S. 438, 485 (Brandeis, J., dissenting).

41. 116 U.S. 616 (1886).

a crime. He characterized such practices as "abhorrent" and "contrary to the principles of a free government."[42] The trial admission of self-incriminating evidence "may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."[43] *Boyd* stressed the intimate relationship between the fourth and fifth amendments as a primary factor in prohibiting the use of illegal evidence, a connection which has not met with recent adherence.[44] An important aspect of the *Boyd* decision is the absence of any discussion concerning a deterrent effect.

There was likewise no mention of the deterrent function in *Weeks v. United States*,[45] the first case directly confronting the exclusionary rule. Various papers and articles[46] of the defendant were seized in a warrantless search of his premises and introduced as incriminating evidence at trial. The Supreme Court reversed the conviction following the analysis developed in the *Boyd* opinion. Nowhere is the judicial integrity purpose of the rule more succinctly expressed than when that Court said:

> To sanction such [police conduct] would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action. . . . The efforts of the courts and their officials to

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42. *Id.* at 632.

43. *Id.*

44. Mr. Justice Black, in his concurrence to the *Mapp* decision, 367 U.S. at 661-66, was probably the last member of the Supreme Court to accept the interrelationship between the fourth and fifth amendments as a justificaion for the exclusion of illegally obtained evidence, despite ample support for such a proposition in the early cases recognizing the exclusionary rule. Boyd v. United States, 116 U.S. at 630, 633; Bramm v. United States, 168 U.S. 532, 544 (1897). Recent opinions remain unsympathetic to the fourth-fifth amendent relationship theory, Bivens v. Six Unknown Federal Agents, 403 U.S. 388, 414 (Burger, C.J., dissenting), although Justice Black continued to assert its application periodically.

For a discussion relating to the application of both the fourth and fifth amendments to the privacy of personal papers, see Note, *Papers, Privacy and the Fourth and Fifth Amendments: A Constitutional Analysis*, 69 NW. U.L. REV. 626 (1974).

45. 232 U.S. 383 (1914).

46. The *Boyd* Court drew a distinction between private papers or documents that were communicative in nature and articles or objects that were not in themselves expressive of any self-incriminating information. 116 U.S. 623. This distinction probably explains the early reliance upon the fifth amendment as another reason for the exclusion of illegally seized evidence. *See* note 45 *supra* and accompanying text. The *Weeks* Court seems to have considered only the relevance of the fourth amendment, 232 U.S. at 389.

> bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.[47]

The *Weeks* majority characterized the exclusion of unlawful evidence as so essential to the protection of the fourth amendment that without such a judicial prohibition, the right to privacy against unreasonable searches and seizures was of no practical value.

Subsequent Supreme Court decisions acknowledged the necessity of the exclusionary rule to a satisfactory implementation of the fourth amendment by extending the *Boyd-Weeks* doctrine to different factual situations.[48] None of the successive cases deviated from the conjoined fourth-fifth amendment analysis formulated in *Boyd* nor from a reliance on the judicial integrity justification for the exclusion of relevant yet illegally obtained evidence. The deterrent aspect emphasized in *Stone v. Powell* was never considered in these early formative opinions. This absence at least raises some question as to the supposed predominance of the deterrent function over the other purposes of the exclusionary rule.[49]

The progression of decisions relying upon the judicial integrity purpose of the exclusionary rule culminated in the dissenting opinions of Mr. Justice Brandeis and Mr. Justice Holmes in *Olmstead v. United States*.[50] These often quoted dissents are the clearest and most forceful expression of the imperative of judicial integrity. The majority opinion had exempted police wire-tapping of the defendant's telephone from the prohibition of the fourth amendment by adopting a restrictive interpretation of the amendment that necessitated physical invasion of the individual's person or premises.[51] The dissenting opinions however recognized a broader scope of privacy guaranteed by the fourth amendment. Each concluded that this method of eavesdropping was an unreasonable search within the meaning of the terms irrespective of any physical trespass.

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47. 232 U.S. at 393-94.

48. *See, e.g.*, Marron v. United States, 275 U.S. 192 (1927); Byars v. United States, 273 U.S. 28 (1927); Agnello v. United States, 269 U.S. 20 (1925); Amos v. United States, 225 U.S. 313 (1921); Gouled v. United States, 255 U.S. 298 (1921); Silverthrone Lumber Co. v. United States, 251 U.S. 385 (1920).

49. *See* text at 111-118.

50. 277 U.S. 438, 469, 471 (1928). Mr. Justices Butler and Stone also dissented to the majority opinion.

51. *Id.* at 464-66

The dissenters were especially interested in the preservation of an ethical and fair-minded governing process. Wire-tapping was illegal within the state in which the federal law officials had collected the incriminating evidence, so that each participant had already committed a state crime. When the federal government then convicted the defendants on the basis of the information thus obtained, Mr. Justice Brandeis regarded the admission of such evidence an assumption of moral responsibility for the crimes committed. "[I]f this court should permit the government . . . to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. If so, the government itself would become a lawbreaker. . . ."[52]

Mr. Justice Holmes expressed equal concern for the role that government should play in obtaining incriminating evidence. In his dissent, the problem was presented as a choice between two competing principles of policy.

> It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.[53]

The principle that emerges from these early decisions and forms the nucleus of the judicial integrity argument is that the court as a part of the governing process should operate as a restraint not only upon individuals but upon itself as well. In this sense, giving effect to the exclusionary rule is no different than when the court declares a statute or other legislation unconstitutional. In both instances, the court as a co-equal third of the government performs its constitutional mandate of checking the excesses of the legislative and executive branches. By refusing to recognize

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52. *Id.* at 483. Mr. Justice Brandeis continued,

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. . . . To declare that in the administration of the criminal law the end justifies the means—to declare that government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

53. *Id.* at 470.

illegally obtained evidence, courts exercise a minimal amount of scrutiny and control over enforcement activities consistent within our traditional system of checks and balances. Maintaining respect and public confidence in the governing process as a whole is a by-product of the judicial intergrity purpose of the exclusionary rule. This is feasible only because the courts often occupy a buffer position between the individual citizen and a pervasive government. The intermediate position of the courts stems from their functional roles as interpretor of the constitution and guarantor of personal rights. As Mr. Justice Brandeis warns in his dissent:

> [I]t is . . . immaterial that the intrusion was in aid of law enforcement. Experiences should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[54]

Taken within this context, the exclusionary rule can be regarded as merely another part of the institutional restraints inherent within our constitutional form of government.

The same constraining principle applies with equal force when the exclusionary rule is given effect on federal habeas review of state convictions. The federal system of government as embodied in the Constitution is a two-way concept. Not only must the central government respect state sovereignty and powers, but the individual states must also yield to minimum facets of conformity necessary for a workable federal system.[55] Such an arrangement is implicit within the concept of federalism. Provincial interests and prejudices are to a certain extent subordinated to the interest of

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54. *Id.* at 479.

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> The conclusion that a federal court should, at some point, have the power to decide the merits of all federal constitutional questions arising in state criminal proceedings (with a habeas court doing so if the Supreme Court has failed to review the issue) may be a sound one, resting on the specific institutional and political premises of our constitutional federalism. . . . The creation of a remedial framework to ensure effective implementation of these commands is, therefore, one of the important tasks of our system.

Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

uniformity. As governments grow larger and more duplicative, there is an accompanying necessity for consistency and simplicity in operation. The guideline for such uniformity is, of course, the federal Constitution, and the extent to which states' interests suffer depends upon how it is interpreted and executed. One important means of implementing the provisions of the federal Constitution is through the traditional extraordinary writ of habeas corpus, which in later decisions had been broadened to include any deprivation of a constitutional right.[56] Although the scope of federal habeas corpus is restricted to the constitutional issue presented, thereby distinguishing it from an appeal, the writ still provides a limited form of review when alternative modes of reconsideration have been blocked or are unavailable.[57]

By virtue of its restrictive scope, federal habeas corpus appears a reasonable means of both respecting state rights and yet standardizing constitutional protection. The federal government possesses no exclusive claim to oppressive police practices. State law enforcement is subject to the same unconstitutional excesses that abridge individual liberty and originally led to the formulation of the exclusionary rule. The need for an effective means of enforcing the fourth amendment is therefore the same. Habeas corpus is the medium through which the federal judiciary can inhibit unconstitutional activity in the states while still remaining within the strictures of federalism. The unique dependence of the fourth amendment upon the exclusionary rule renders its application in federal habeas review of state convictions as indispensable to the protection of privacy as if the case had originated in the federal system of courts. Giving effect to the exclusionary rule therefore tends to promote a healthy modicum of uniformity within the states. Uniformity in this context should not be regarded as stifling

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56. *See* Mr. Justice Brennan's account of the historical development of habeas corpus in Fay v. Noia, 372 U.S. at 399-426. *Cf.* Schneckloth v. Bustamonte, 412 U.S. 218, 250 (Powell, J., concurring). *Compare* Bator, *supra* note 55, at 463-507, *with* Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961). For a list of other authorities on the history of federal habeas corpus, see Wainwright v. Sykes, ____ U.S. ____ , 97 S.Ct. 2497, 2501 n.6 (1977).

57. As Mr. Justice Brennan noted,

> A defendant by commiting a procedural default may be barred from challenging his conviction in the state courts even on federal constitutional grounds . . . .
>
> It is a familiar principle that the Supreme Court will also decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the co-presence of federal grounds.

Fay v. Noia, 372 U.S. 391, 428 (1963).

adherence to a static rule but rather as the relatively fundamental right to privacy which citizens should reasonably be able to expect from their coexistent federal and state governments. Federal habeas corpus for state prisoners then helps to maintain the integrity of state governments by ensuring that constitutional standards have been fairly and uniformly met. Interference with state affairs is held to a tolerable level because of the limited scope of review described above. Hence, state governments share in the aura of public confidence and respect engendered by the judicial insistence upon principles of law.

Despite contrary statements in *Stone*, the exclusionary rule does effectuate the objectives of the fourth amendment by means other than deterrence. The injury to a victim of an unreasonable search is also redressed as much as possible by excluding from the trial evidence or other information[58] thereby obtained. The *Stone* argument presupposes that the only valid means of effectuating the fourth amendment through the exclusionary rule is the *future* prevention of physical intrusions upon privacy by deterring unconstitutional police conduct. This approach is too restrictive and shortsighted. The court can obviously do nothing to alter the past physical fact of an unreasonable search or seizure. Yet, the objective of the fourth amendment can still be effectuated by rectifying the legal consequences which normally follow the violative conduct.

The Personal Aspect Of The Exclusionary Rule

The ultimate objective of the fourth amendment is to protect the privacy of the individual's home and effects through the prohibition of unreasonable searches and seizures.[59] In giving full effect to the exclusionary rule on federal habeas corpus as well as on direct review, the court seeks to approximate the state of affairs that existed before invasion of the citizen's privacy. Indeed, as Mr. Justice Powell points out, this "reparation comes too late"[60] to vindicate the individual's right to privacy entirely in the sense of completely eras-

58. *See* Wong Sun v. United States, 371 U.S. 471 (1963); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (fruits of illegally seized evidence).

59.

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life.

Boyd v. United States, 116 U.S. 616, 630 (1886).

60. 428 U.S. at 486 (quoting Linkletter v. Walker, 381 U.S. 618, 637 (1965)).

ing the past physical intrusion. But this states a truism characteristic of most judicial remedies.[61] Nevertheless, the rule can still prevent an even greater and potentially more serious invasion of privacy by proscribing the use of unconstitutionally obtained evidence in a criminal trial[62] that is at least partially dependent upon the implications of such evidence.[63] An invasion of privacy does not end simply with cessation of the physical act of intrusion, but continues as long as the consequences of such derived evidence remain in effect.[64] Regardless of whether the introduction of evidence

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61. For example, damages cannot truly compensate the tort victim for pain and suffering or defamation, the landowner for waste, simple trespass, or encroachments, the surviving family for wrongful death, and so on, because the "reparation comes too late." Nor does restitutionary relief always vindicate the plaintiff's rights since it often forfeits the benefit of the bargain. The equitable remedy of specific performance, although limited in application to only certain strictly defined situtations, seems the closest equivalent to the exact reparation that Mr. Justice Powell wants to impose upon the operation of the exclusionary rule. The impossibility of fully restoring one's rights is shared by most other remedies and is the rule rather than the exception. This is particularly true of tortious wrongs which are, most closely related to criminal conduct, especially in the area of privacy rights.

62. *Compare* United States v. Janis, 428 U.S. 433 (1976), which held that the "exclusionary rule should not be extended to forbid the use in the civil proceeding of one sovereign of evidence seized by a criminal law enforcement agent of another sovereign." *Id.* at 460.

63. Such implications are subject to the "harmless constitutional error" doctrine enunciated in Chapman v. California, 386 U.S. 18 (1967). The doctrine supports the *Stone* argument that even constitutionl rights may be limited in particular situations where the benefits of adhering to the right are offset by the social costs of its application. However, it seems unusual that a fourth amendment claim based on the admission of unlawfully obtained evidence should ever be categorized as harmless error. The *Chapman* Court characterized the test as "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 23 (quoting from Fay v. Connecticut, 375 U.S. 85, 86-87 (1963)). The mere introduction of evidence, especially if over the objection of defendant, attests to its contribution to the conviction. Otherwise, the evidence would never have been offered. Here, the guilt reliability of such evidence, cited in *Stone* as a reason for denying the fourth amendment claim on federal habeas corpus, militates against any finding of "harmless constitutional error." One can perhaps conceive of situations where the contribution of an item of evidence might be minimal. Yet by the same token, it is unlikely that a prosecutor would be willing to risk the possible reversal of a conviction on appeal for only an incremental indicia of guilt. More than likely, such illegally obtained evidence would not be introduced unless actually needed for a conviction.

64. The consequences furthered by the judicial admission of evidence that was acquired in violation of the fourth amendment lie in the broadened scope of public scrutiny then available and the possible deprivation of freedom and/or property due to the effect of prejudicial evidence. Surely these additional personal interests are entitled to as much constitutional protection as the virtually remediless physical invasion of privacy.

obtained through an unreasonable search and seizure is characterized as part of the original invasion of privacy or a separate violation of the fourth amendment, the exclusionary rule prohibits any judicial recognition that subjects the individual already victimized to the further disadvantage of defending against the prejudicial influence of such evidence. Thus, the constitutional objective of the fourth amendment is not furthered by anything less than the full application of the exclusionary rule on trial, appellate review, and federal habeas corpus. At each level the effects of the initial invasion of privacy are still operative to threaten the liberty and security of the individual prosecuted.

The same early decisions that fashioned the "imperative of judicial integrity" also relied upon the protection of personal constitutional rights as a legitimate function of the exclusionary rule. The viablility of the judicial integrity argument itself depends upon the willingness of the judicial system to safeguard the interests of the defendant under the fourth amendment by disregarding relevant yet illegally obtained evidence. The guarantees secured by the fourth amendment are worth little if its protection is denied to the very individuals who are most in need of it because of the serious consequences at stake. The *Boyd* opinion recognized the personal aspect of the fourth amendment and by implication the exclusionary rule when Mr. Justice Bradley stated:

> It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense—it is the invasion of this sacred right which underlies and constitutes the essence of the [fourth amendment prohibition against searches and seizures].[65]

After reference to the above remarks of *Boyd*, the *Weeks* decision acknowledged the implication that the exclusionary rule is an indispensable means of vindicating the privacy interest of the defendant and not just of society in general.

> If [personal effects] can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such seizures, is of no value, and, so

65. 116 U.S. at 630.

> far as those thus placed are concerned, might as well be stricken from the Constitution.[66]

The *Boyd* and *Weeks* decisions illustrate the interdependence of government integrity and the protection of personal privacy interests. Although intimately related, each justifies application of the exclusionary rule in a separate manner. As already noted, the judicial integrity aspect of the rule operates as a self-regulating check upon the government itself. The protection of individual privacy, on the other hand, seeks to redress unwarranted intrusions by negating consequent encroachments into the defendant's privacy. This latter function of the rule focuses solely on the accused rather than intra-governmental relationships or the interests of society as a whole.

Even *Wolf v. Colorado*,[67] a subsequent decision which denied the imposition of the exclusionary rule on states, recognized the personal aspect of the rule when it depicted, "the exclusion of evidence [as] a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found."[68] Although *Wolf* was eventually overruled by *Mapp v. Ohio*, the latter opinion also relied upon the "integrity of individual rights"[69] as well in expanding application to the states.[70]

An individual has a personal right of constitutional dimensions to the unabridged effectuation of the exclusionary rule, and this right provides the basis from which the very meaning of the fourth amendment is derived. Certainly, the exclusionary rule "is not a personal constitutional right"[71] in itself, since nowhere in the Constitution is it expressly mentioned. Nevertheless, the fourth amendment absent the effect of the exclusionary rule is reduced to a mere "form

66. 232 U.S. at 393.
67. 338 U.S, 25 (1949).
68. *Id.* at 30-31.
69. 367 U.S. 643, 647 (1961).
70.

> In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. . . . The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assume in either sphere is that no man is to be convicted on unconstitutional evidence.

Id. at 656-57.
71. Stone v. Powell, 428 U.S. 465, 486 (1976).

of words"[72] representing a constitutional right which has little, if any, meaningful substance. In effect, the rule gives content to the prohibitions of the fourth amendment by providing the only viable means presently available to remedy violations of an individual's right to privacy.[73] The exclusionary rule is thus an indispensable condition to the actualization of privacy interests comprising the fourth amendment.

When *Stone v. Powell* denied the personal aspect of the exclusionary rule, the generalized *effect* of the rule upon society as a whole was confused with its actual limited purpose in trial. Strictly construed, the exclusionary rule has no function outside the confines of a trial. The defendant is provided an opportunity through application of the rule to object to the admission and use of evidence obtained and offered in violation of his fourth amendment right of privacy. In deliberating upon defendant's motion to suppress, the trial judge is not concerned with the generalized effect of his ruling on society. His focus should concentrate instead on whether the defendant's privacy interest in home and personal effects has been violated by an "unreasonable search and seizure." The generalized effect of the exclusionary rule outside the trial context is of secondary concern. It is an important concern, but not the prime nor original reason for which the exclusionary rule was formulated.[74] Moreover, the deterrent effect on unlawful police conduct, which *Stone v. Powell* emphasizes, ultimately depends on the personal application of the exclusionary rule to individual defendants on trial. Fourth amendment rights cannot be generally safeguarded in society absent the protection of the individual constitutional rights of privacy, for society is not something other than the individuals which comprise it. The general deterrence doctrine derives whatever effectiveness it has from the personal use of the exclusionary rule by defendants, not from the rule itself in isolation.

The Deterrent Function And Its Role In Stone v. Powell

The deterrent function of the exclusionary rule first surfaced in *Wolf v. Colorado*, which was decided more than thirty-five years after the first expression of the principle. Prior to *Wolf*, deterrence

72. Silverthorne Lumber Co. v. United States, 251 U.S. at 392.

73. *See* note 108 *infra*.

74. There is no evidence suggesting that the framers of the exclusionary rule concerned themselves or even considered what deterrent effect the operation of the rule would have upon the police or society in general. *See generally* Boyd v. United States, 116 U.S. 616 (1886) and pp. 100-07.

of unconstitutional conduct was never forwarded as a reason for the exclusion of evidence. This conspicuous absence from the formative period of the exclusionary rule tends to depreciate deterrence as the prime justification for the judicial remedy. The reversal of *Wolf* and subsequent application of the exclusionary rule to the states by *Mapp v. Ohio* was not principally based "upon the belief that exclusion would deter future unlawful police conduct,"[75] as claimed in *Stone*. Rather, the *Mapp* opinion was predicated almost entirely upon the judicial integrity and personal aspect justifications for the rule.[76] The deterrent purpose was advanced primarily in reference to an earlier case,[77] and exercised only minimal influence on the opinion. Although the deterrence objective of the exclusionary rule can hardly be ignored, reliance upon the *Mapp* decision to support its pre-eminent status among the multiple purposes of the rule is misplaced.

The restrictive effect of post-*Mapp* decisions upon the scope of the exclusionary rule stems from reliance upon the deterrent function. It is no coincidence that three of the four cases cited in support of the deterrent emphasis of *Stone v. Powell* were decisions which denied retroactivity of the rule.[78] The first and most significant decision, *Linkletter v. Walker*,[79] rejected extension of *Mapp* to state convictions which had become final prior to the reversal of *Wolf*. This denial of retroactivity was primarily predicated on the unlikelihood that deterrence of police misconduct would be advanced by making the rule retrospective.[80] Although reluctance to expand *Mapp* beyond prospective application was understandable due to the anticipated volume of appeals, the narrowness of the *Linkletter* rationale is still difficult to justify. As Mr. Justice Black pointed out in his dissent:

> I have read and reread the *Mapp* opinion but have been unable find one word in it to indicate that the exclusionary search and seizure rule should be limited on the

75. 428 U.S. at 484.

76. *See* 367 U.S. at 646-48, 656, 657, 659-60.

77. Elkins v. United States, 364 U.S. 206 (1960).

78. 428 U.S. at 486.

79. 381 U.S. 618 (1965).

80. *Id.* at 636-37. Other reasons mentioned for the denial of retroactivity were state-federal relationships (federalism), the orderly administration of justice (the unavailability of evidence or witnesses years after the convictions) finality of judgment, and the integrity of the judicial process. *See* pp. 100-07 for a discussion of the later notion.

> basis that it was intended to do nothing in the world except to deter officers of the law.[81]

Nevertheless, despite this lack of support in *Mapp*, subsequent decisions such as *Tehan v. Shott*[82] and *United States v. Peltier*,[83] which were also cited by *Stone* and dealt with the same issue of retroactivity, continued to emulate the deterrent analysis of *Linkletter* with only minor variations. None of these decisions concerning retroactivity expressly renounced the additional justifications that had been traditionally recognized for application of the rule.[84] Although seldom mentioned, the other purposes underlying the exclusionary rule were certainly as relevant to the outcome of these later decisions as the deterrent function, inasmuch as the sole issue was the retroactivity of a previous interpretation of the fourth amendment.

What emerges then from this cursory review of post-*Mapp* decisions is a principle of selective treatment applicable whenever the scope of the exclusionary rule is to be restricted. If the availability of the exclusion remedy is limited, then only the deterrent purpose of the rule is acknowledged by the Court since its ineffectiveness can most plausibly be argued in a variety of factual contexts.[85] The additional functions of the exclusionary rule are largely

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81. *Id.* at 649 (Black, J., dissenting).

82. 382 U.S. 406 (1966).

83. 422 U.S. 531 (1975).

84. The *Peltier* decision explicitly recognized the "imperative of judicial integrity" purpose of the exclusionary rule. *Id.* at 536-39. The Court reconciled its denial of retroactivity by holding that

> the "imperative judicial integrity" is also not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution.

Id. at 538. This rationalization ignores that the imperative also applies to courts, which have an even greater duty to disaffirm unreasonable searches and seizures. Morever, the judiciary cannot hide behind a good faith standard of decision-making.

85. *See, e.g.*, United States v. Calandra, 414 U.S. 338 (1974) (a grand jury witness may not refuse to answer questions on the ground of a fourth amendment claim); Alderman v. United States, 394 U.S. 165, 174 (1969) (only those individuals whose privacy rights have been actually infringed have standing to object to the introduction of unconstitutionally seized evidence); Bumper v. North Carolina, 391 U.S. 543, 560-61 (1968) (Black, J., dissenting) (that the deterrent effect of the exclusionary rule on police is not lessened by application of the harmless error doctrine to an illegal search); Elkins v. United States, 364 U.S. 206, 217 (1960) (denial of the "silver platter" doctrine whereby evidence illegally obtained by state officials could be used in a federal criminal trial); Walder v. United States, 347 U.S. 62, 65 (1954) (the fourth

ignored unless the operation of the rule is reaffirmed, because their relevance and effect are less subject to qualification and therefore more difficult to reconcile with restrictions on the application of the rule. *Stone* is simply the latest case following the lead established by *Linkletter*.

The success of the deterrence theory of the exclusionary rule is also questioned by Mr. Justice Powell in *Stone*. He is not the first critic of the rule to doubt its presumed effect upon police conduct in violation of the fourth amendment. Empirical studies, referred to in *Stone*, indicate that the proscription of evidence obtained in derogation of the fourth amendment at whatever judicial level has not proven to be the anticipated panacea of individual privacy.[86] Some investigations suggest that unreasonable searches and seizures by the police have continued virtually unabated since *Mapp* was decided in 1961,[87] thereby calling into question the effectiveness of the deterrent function. Measurements on a variety of indices[88] have convinced many researchers of the general impotency of the rule's deterrent effect on the acquisition of illegal evidence. Yet these same research-

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amendment exclusionary rule does not prohibit the impeachment of a defendant who testifies in his own behalf). *Cf.* Harris v. New York, 401 U.S. 222, 225 (1971) (An inadmissible statement under Miranda v. Arizona, 384 U.S. 436 (1966) may still be used by the state to impeach the credibility of the defendant.).

The *Calandra* decision is particularly relevant in that Mr. Justice Powell wrote the majority opinion and employed the same social cost-benefit analysis that he later used in the *Stone* case.

86. 428 U.S. at 492 n.32.

87. *See generally* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970) [hereinafter cited as Oaks], Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUDIES 243 (1973) [hereinafter cited as Spiotto]. *Contra*, Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681, 684 (1974) [hereinafter cited as Canon]. Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U.L. REV. 740 (1974) [hereinafter cited as Critique].

88. The Oaks study, for example, attempted to measure the presumed detterent effect according to the results of questionnaires, the exclusionary rule's effect upon motions to suppress evidence, its effect upon arrests and convictions, the change in the amount of property seized by police, reported reasons by police for arrests, observations of police behavior, and a comparison with the Canadian experience without the rule. Oaks, *supra* note 87, at 678-709.

The Spiotto research, *supra* note 87, at 254-69, concentrated on the incidence and frequency of motions to suppress at different stages of proceeding and evaluated such according to the effect that a variety of factors had upon the ultimate disposition of the motion.

ers and the author of *Stone* itself admit that the evidence is inconclusive.[89]

Moreover, the empirical evidence advanced in these earlier surveys has been qualified by subsequent research. Whereas some of the indices suggest that the deterrent aspect of the exclusionary rule is weak or nonexistent, other indicators show a positive relationship between the imposition of the rule and a reduction in the amount of unconstitutional police activity.[90] The commentators in these later studies have depreciated previous findings critical of the deterrent effect of the exclusionary rule on the bases of sample, design, and interpretation.[91] At the very least, the more recent studies reinforce the inconclusiveness of prior statistical examinations.[92] Even if the indecisiveness of this new data is also conceded,

89. Oaks, *supra* note 87, at 709. Stone v. Powell, 428 U.S. 465, 492 n. 32. *See* note 92 *infra.*

90. *See* Canon, *supra* note 87, at 702-725. Canon concludes:

> Different measures point in varied and sometimes slightly contradictory directions and some of the results are subject to ambigous interpretation. Taken as a whole, the main emphasis to be put on the findings is a negative one; they cast considerable doubt on earlier conclusions that the rule is ineffective in deterring illegal police searches. To be sure, such an assertion may have been appropriate at one time, and as some of our evidence suggests, there are still circumstances in which the rule has a minimal impact on police behavior. But these circumstances are comparatively few. Most of our data do not permit such an inference. Indeed, a good many of the findings support a positive inference—that the rule goes far toward fulfilling its purpose. Beyond this, the incomplete nature of the data and ambiguity of its interpretation serve to aid arguments on behalf of the rule's effectiveness because in this situation at least it is easier to demonstrate the existence of widespread non-compliance with the fourth amendment than it is to demonstrate compliance.

Id. at 725-26.

91. Critique, *supra* note 87, at 744-56. The author summarizes his disagreement with a prior research effort with the following reasons:

> First, it rests on a highly selective interpretation of data which was collated in a somewhat haphazard fashion. Second, the inference upon which the conclusion of the rule's deterrent inefficacy rests is based on a research design which contains a critical mistake regarding the date of the rule's introduction in Illinois. Third, motions to suppress cannot be used as indicators of illegal searches for the type of research question posed by Spiotto.

See also Canon, *supra* note 87, at 697-702.

92.

> Nonetheless, the inconclusiveness of our findings is real enough; they do not nail down an argument that the exclusionary rule has accomplished its task.

Id. at 726.

> A review of Spiotto's research and that conducted by others does not demonstrate the ineffectiveness of the exclusionary rule. Rather it tends

such evidence reestablishes in at least some contexts the possiblity of the deterrent effect of the exclusionary rule.

The principal reason underlying the reluctance of the *Stone* majority to accept the unqualified extension of the deterrence argument to federal habeas corpus was an adherence

> to the view that these considerations support the implementation of the exclusionary rule at trial and its enforcement on direct appeal of state court convictions. But . . . there [is no] reason to assume that any specific disincentive already created by the risk of exclusion of evidence at the trial or the reversal of convictions on direct review would be enhanced if there were the further risk that a conviction obtained in state court and affirmed on direct review might be overturned in collateral proceedings often occurring years after the incarceration of the defendant.[93]

These remarks imply that the *Stone* concept of the efficacy of deterrence depends upon the proximity of review to the unlawful police activity. Thus, the deterrent effect of the exclusionary rule would be lessened as judicial review of the police conduct in question became more remote in time and stage of proceeding. Deterrence, according to the *Stone* analysis, would be strongest when the exclusionary rule is immediately effected by the trial court, weaker when resulting in reversal on direct review, and minimal or non-existent when the protection of the rule is given effect on collateral attack.

Stone v. Powell's deterrence theory of "diminishing returns"[94] is plausible, but the explanation is subject to the same limitations of research previously noted making empirical verification difficult. An equally plausible theory of deterrence rests on a different premise concerning police perception of the exclusionary rule. This alternative theory suggests that deterrence is not a function of proximi-

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> to illustrate the obstacles that stand in the way of any sound, empirical evaluation of the rule. When all factors are considered, there is virtually no likelihood that the Court is going to receive any "relevant statistics" which objectively measure the "practical efficacy" of the exclusionary rule.

Critique, *supra* note 87, at 763-64.

93. 428 U.S. at 493.

94. *Id.* at 493 n.34. This reference to "diminishing returns" may not have the same meaning as it is used by Amsterdam, since he emphasizes repetitive rather than temporal measurement. Nevertheless, the term will be employed in the latter sense as defined in the text.

ty, but rather a function of police dissatisfaction and frustration with the overall practical effect of the exclusionary rule.

This theory proceeds upon the basis that law enforcement officials are discouraged from violating fourth amendment rights if ever because effectuation of the exclusionary rule at any stage of judicial proceedings makes their work more difficult and ineffective. Personal perceptions of efficacy, equity, and professionalism are impugned by judicial application of the exclusionary rule to evidence conscientiously compiled by police investigation. If accurate, the effectuation of the exclusionary rule on federal habeas review would engender just as much police discontent with the operation of the rule as on trial and appellate levels. At this stage, not only have law enforcement resources been fruitlessly squandered, but a potentially dangerous individual may be released to threaten society once again. This increases police work loads and exposes the organization to allegations of inefficiency. Such broad policy concerns are operative regardless of how remote the judicial application of the rule is from police conduct. In short, the deterrent effect of the exclusionary rule does not vary throughout prolonged judicial proceedings because the practical impact of the rule upon law enforcement remains the same.[95]

It is this general recognition of the rule's inhibitory influence on law enforcement practices and efficiency that forms the basis of the deterrence theory of the exclusionary rule since personal sanctions are rarely involved. One must otherwise presume that police officers who have not directly encountered the operation of the rule themselves are not deterred from unreasonable searches and seizures. This approach to the deterrent function presents a rather unflattering picture of police enforcement inasmuch as it characterizes the attitude toward the exclusionary rule in terms of "out of sight, then out of mind." The *Stone* interpretation of the

95. *But see* Oaks, *supra* note 87, at 720-24, in which the author notes that the variable effect of deterrence upon police depends on the character of the illegal activity being investigated. Even if the variable effect of deterrence is conceded, the exclusionary rule may at least have some effect on police behavior in the investigation of more "serious" crimes that will more than likely go to trial. This fact alone may be sufficient to justify its retention.

It should also be noted that the publicity attendant "serious" crimes may draw public and police attention to the exclusion of evidence at even later stages of judicial review. The public outrage accompanying the retrial or release of a successful, yet obviously guilty, federal habeas applicant cannot escape police attention. This may provide even greater disincentives for ignoring the right against unreasonable searches and seizures.

deterrent effect errs when it purports to quantify police reaction to the exclusion of evidence according to the judicial stage at which it is effectuated. Certainly, most law enforcement officials are unaware of and disinterested in what transpires in a case beyond the trial level in which they participate, but that does not mean they are ignorant of the operation of the exclusionary rule in subsequent judicial proceedings. More likely, police officers perceive and understand the practical effect of the rule's utilization regardless of its immediacy.

Stone's adherence to enforcement of the exclusionary rule on direct review of state convictions[96] also undermines its argument, because the appeal process may also last "years after the incarceration of the defendant"[97] as with federal habeas corpus. Moreover, once presently available state remedies have been exhausted, the defendant can obtain federal habeas review even before certiorari is attempted demonstrating that the collateral remedy may be more proximate to police perception than direct review.[98] This inconsistency in the reasoning of *Stone* may presage further restrictions on the application of the exclusionary rule in contexts other than the trial level.

Effecting the exclusionary rule on federal habeas review contributes as much to the overall deterrent effect as any other application of the rule, insofar as it is the "practical" influence of the rule upon law enforcement that constitutes the disincentive necessary for any discouragement of future police misconduct. Consequently, restrictions on the application of the rule on federal habeas review detract from the total deterrent effect as much as any restraint on its trial use. Deterrence, therefore, depends upon the reconsideration of fourth amendment claims on federal habeas review as well as at the trial and appellate court levels. No rational basis exists for differentiating degrees of deterrence predicted upon the proximity of judicial examination to unconstitutional police behavior.

The Educative Effect Of The Exclusionary Rule

Although the immediacy of the exclusionary rule to law endorcement authorities serves a vital social function, this role more appropriately relates to what Mr. Justice Powell terms the "educative effect of the exclusionary rule":[99]

96. 428 U.S. at 493.

97. *Id.*

98. *See also* Stone v. Powell, 428 U.S. 465, 509 n.8 (1976); Fay v. Noia, 372 U.S. 391, 435-38 (1963).

99. 428 U.S. at 493.

> [O]ur society attaches serious consequences to violation of constitutional rights and is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system. . . .
>
> [E]ach case in which such claim is considered may add marginally to an awareness of the values protected by the Fourth Amendment.[100]

The exclusionary rule thus may contribute to the implementation of fourth amendment rights not only by discouraging "unreasonable searches and seizures" by the police, but also by conveying relevant constitutional guidelines to the same officials. Here the educative effect of the exclusionary rule, unlike the deterrent function, is somewhat dependent upon proximity to law enforcement, since awareness of the rule and the reasons for its operation are more likely to be learned and retained if encountered on a first-hand basis rather than indirectly through the deterrent effect of the rule. This reliance upon proximity does not necessarily depreciate the importance of the educative purpose of the rule on collateral review, since federal habeas corpus is sometimes the only avenue available to air a state prisoner's constitutional claim.[101] Application of the exclusionary rule on federal habeas review serves as an alternate route through which fourth amendment information may still be communicated to the enforcement branch of government. Although there are problems in substantiating the deterrent effect of the rule empirically, its continued effectuation on federal habeas corpus may still be justifiable solely on the basis of this educative function which provides another means of introducing and instilling appropriate constitutional precepts.[102] The positive nature of the

100. *Id.* at 492-93.

101. *See* note 57 *supra.*

102.

> By demonstrating that society will attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law. Over the long term this may integrate some fourth amendment ideals into the value system or norms of behavior of law enforcement agencies.

Oaks, *supra* note 87, at 756. *See also id.* at 711-12, 729.

> As has always been the case, the educative effect of the exclusionary rule ultimately depends upon the clarity of the analysis associated with its application. Only if readily understandable principles are offered in explanation of the rule's operation can law enforcement authorities be expected to make appropriate constitutional decisions in regard to fourth amendment rights. *Id.* at 731. The Supreme Court has perhaps been validly criticized in the past for not rendering discernible guidelines for police conduct. *Stone* offers no such guidance since it avoided the fourth amendment claim completely.

educative effect, as contrasted to the negative character of the deterrent function, would be further enhanced if something other than disincentives were available to encourage police compliance with the demands of the fourth amendment. If positive incentives were also provided,[103] the educative effect of the exclusionary rule might emerge from behind the shadow of the deterrent function as the predominant justification for the rule. In this manner, the carrot and stick approach of the educative and deterrent purposes of the exclusionary rule might be more effective in realizing the objectives of the fourth amendment.

THE CONSTITUTIONAL ASPECTS OF THE EXCLUSIONARY RULE AND FEDERAL HABEAS CORPUS

Nowhere does the Constitution expressly require that illegally obtained evidence be excluded form judicial proceedings. Yet it is also clear from the language in numerous decisions[104] "that the [exclusionary] rule is of constitutional origin . . . ."[105] The appropriate characterization of the exclusionary rule remains then a central question in the evaluation of the *Stone v. Powell* argument. Is it merely, as Mr. Justice Powell asserts in *Stone*, a judicial implement designed to effectuate the rights secured by the fourth amendment? If so, the rule would justifiably be subject to virtually any limitation predicated on persuasive policy considerations. Or is the rule, as Mr. Justice Brennan maintains in his dissent to *Stone*, "a constitutional ingredient of the fourth amendment, any modification of [which] should at least be accomplished with some modicum of logic and justification . . . ?"[106]

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103. One positive incentive might include increased salary and/or rank for participation in ongoing legal education clinics. Such programs do not ensure actual observance of fourth amendment rights but at least provides continuous exposure to relevant principles and guidelines. *See* Spiotto, *supra* note 87, at 274-75. Another possible incentive might be greater judicial or civic encouragement and recognition of police adherence to constitutional standards. An often overlooked yet invaluable source of positive encouragement for police is the local prosecutor, who is in an unparalleled position to impart information and guidance. Whether such contact is informal or takes place in a trial setting the prosecutor has a prime opportunity to explain the permissible limits of the fourth amendment prohibition to officers. *Id.* at 276. *See also* Oaks, *supra* note 87, at 730-31.

104. *See, e.g.*, Wolf v. Colorado, 338 U.S. 25, 47 (1949) (Rutledge, J., dissenting); Olmstead v. United States, 277 U.S. 438, 462 (1928); Byars v. United States, 273 U.S. 28, 29-30 (1927); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); Weeks v. United States, 232 U.S. 383, (1914).

105. Mapp v. Ohio, 367 U.S. at 649.

106. 428 U.S. at 534 (Brennan, J., dissenting).

Although the opinions in *Stone v. Powell* appear to leave no middle ground, the answer may lie somewhere between the two alternatives suggested above. The exclusionary rule is only one of a variety of possible judicial and administrative methods that could be employed to enforce compliance with the prescription of the fourth amendment. Possible variations include civil tort remedies against or criminal prosecution of law enforcement officials, administrative disciplinary proceedings, and even reasonable citizen resistance to unconstitutional searches and seizures. However, prior experience with other means of securing compliance with the fourth amendment have not proven entirely satisfactory as borne out by the majority opinion in *Mapp*, which stated, "the [impression] . . . that such other remedies have been worthless and futile is buttressed by the experience of other states."[107] The comparative inadequacy of other "remedies" when coupled with the fact that the exclusionary rule is the only viable means presently available to effectuate the constitutional right against unreasonable searches and seizures[108] integrates the rule into the Constitution more intimately than the position normally occupied by a judicial rule of law. Within this context, imposing limitations on even a judicially created rule necessarily hinders full effectuation of the desired objective: in this instance, the rights guaranteed by the fourth amendment. Thus, although the exclusionary rule may only express malleable judicial policy as Mr. Justice Powell points out, past experience and exclusive reliance on the exclusionary rule still make it indispensable to the continued vitality and effectiveness of the fourth amendment.

If the foregoing is accurate, then the *Stone* cost-benefit analysis of the exclusionary rule is inappropriate and should not be followed, inasmuch as social costs or benefits are irrelevant to the enforcement of constitutional guarantees.[109] While social considera-

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107. 367 U.S. at 652. *See also* Irvine v. California, 347 U.S. 128, 137 (1954); Wolf v. Colorado, 338 U.S. 25, 41-6 (1949) (Murphy, J., dissenting); People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 911 (1955).

108. *See* Spiotto, *supra* note 87, at 269-72; Critique, *supra* note 87, at 792-93; Oaks, *supra* note 87, at 673-74.

109.

> As was noted at the beginning of the article, the exclusionary rule is undergoing a crisis. On the basis of some cursory and perhaps symptomatice diagnosis, it has nearly been pronounced dead. In the not too distant future our courts and legislative bodies will have to decide whether they want to accept this diagnosis and issue the death certificate. Hopefully in this situation, as should be the case in all important questions of public policy, such a decision will be based on as large a quantity of reliable and valid information as can reasonably be obtained. This is

tions may be relevant to the interpretaton of "unreasonable" in the language of the fourth amendment, such conventional notions cannot affect its enforcement. That determination was made and taken out of the hands of the judiciary when the constitution was initially formulated. Courts must enforce the prohibitions of the fourth amendment to the fullest extent, and the exclusionary rule is a tool of enforcement, not interpretation. Restrictions upon the application of the exclusionary rule are, therefore, by inference impermissible limitations upon the scope of the fourth amendment itself due to their interrelationship.

One cannot reasonably presume that the framers of the constitution were naive enough to believe that mere statement of the fourth amendment was sufficient to secure the right against unreasonable searches and seizures. They undoubtedly realized and anticipated that additional implements would be necessary to fully protect the interests of personal privacy against unwarranted invasions by government officials. In the absence of viable alternatives, the exclusionary rule alone preserves the integrity of the fourth amendment. This intimate relationship with the fourth amendment should accord the exclusionary rule the respect usually accruing to a provision of constitutional status even if such deference is derivatively acquired. Any single rule of law which not only facilitates but actually enables the operation of a constitutional provision deserves the same judicial recognition and protection as the right itself.

Because the relationship between the exclusionary rule and the fourth amendment is so intimate, it is somewhat ironic that *Stone* denies reconsideration of allegedly inadmissable evidence on federal habeas corpus but not other levels of proceeding. Absent a showing of "inadequate" state treatment, federal habeas corpus relief for state prisoners asserting fourth amendment claims will now be prohibited. The interests protected by the fourth amendment through the exclusionary rule would seemingly be more pronounced rather than rstricted due to the exclusive attention devoted to the infringements of constitutional guarantees on federal habeas corpus.

> particularly the case where constitutional policies are involved. By definition as well as by tradition, such policies should be stable. Stability should not be equated with inflexibility. But stability does mean that constitutional policies should be more than mere reflections of prevailing ideological winds, and it suggests that the consideration which goes into the promulgation of these policies extends beyond casual or emotional reaction to particular events or short-term political pressures.

Canon, *supra* note 87, at 726.

Yet the question still remains: why provide a special remedy for constitutional claims when state trial and appellate courts have the explicit duty to recognize and protect constitutional rights? A variety of answers have been offered to explain this seeming duplication of effort. Some writers have commented on the relative inadequacy of state post-conviction procedures and record-keeping.[110] Although most states are adopting improved post-conviction techniques, there may be merit to the suggestion that federal habeas corpus continues to act as an incentive for states to improve methods of ensuring constitutional rights by providing an ongoing and independent check upon convictions.[111] The Court in *Kaufman v. United States* recognized this aspect of federal habeas review when it held that, "the availability of collateral remedies is necessary to insure the integrity of proceedings at and before trial where constitutional rights are at stake."[112] A byproduct of this federal stimulus, as with the judicial integrity purpose of the exclusionary rule, is a healthy consistency of minumum standards of constitutional protection throughout the states.[113] Another commentator has remarked on the greater likelihood of impartiality[114] and expertise[115] in the federal system as contrasted to local state courts. This perspective is subject to serious dispute and has been criticized as an unwarranted aspersion upon the quality and integrity of state judicial systems.[116] Nevertheless, defenders of state sovereignty cannot realistically deny past unconstitutional deprivations on the part of state courts. Such abridgements of constitutional guarantees laid

110. Bator, *supra* note 55, at 519-23; Wright and Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 898-902, 984 (1966); Freund, *Remarks*, in *Symposium: Habeas Corpus—Proposals for Reform*, 9 UTAH L. REV. 18, 28-29 (1964). *See generally* Reitz, *Federal Habeas Corpus: Post Conviction Remedy for State Prisoners*, 108 PAC. L. REV. 461, 487-97 (1960).

111. *See* Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 24 (1956); Reitz, *supra* note 4, at 1352-54.

112. 394 U.S. at 225. Inasmuch as Kaufman concerned the availability of federal habeas review for federal prisoners, this statement applies with even greater force to state prisoners, who have not already had the opportunity to be heard in a federal forum. *But see* 428 U.S. at 481 n.16, where Mr. Justice Powell rejects the *Kaufman* extension of the exclusionary rule to federal habeas reveiw of state convictions as mere dicta. He also characterizes the *Kaufman* decision as an illustration of the Supreme Court's supervisory role over lower federal courts. Certainly, this was not the meaning of Mr. Justice Brennan, the author of *Kaufman*, as evidenced by his dissenting remarks in *Stone*, 428 U.S. at 519-23.

113. *See* note 55 *supra*. Wright and Sofaer, *supra* note 110, at 897-99.

114. Bator, *supra* note 55, at 510.

115. *Id.*

116. *See* note 3 *supra* and accompanying text.

the foundation for expansion of federal habeas corpus to those in state custody.[117] State prisoners asserting fourth amendment claims should have a right to press such claims in the judicial system which has the ultimate responsibility and explicit authority to adjudicate constitutional issues: the federal court system. Mr. Justice Brennan in *Kaufman* unmistakably expressed this right:

> Our decisions leave no doubt that the federal habeas remedy extends to state prisoners alleging that unconstitutionally obtained evidence was admitted against them at trial.
>
> * * *
>
> . . . The provision of federal collateral remedies rests . . . fundamentally upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief.
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> * * *
>
> . . . With regard to both federal and state prisoners, Congress has determined that the full protection of their constitutional rights requires the availability of a mechanism for collateral attack. The right then is not merely to a federal forum but to full and fair consideration of constitutional claims.[118]

Virtually all of the above reasons for providing federal habeas corpus to state prisoners can be capsulized into the different emphases of the state trial-appellate review versus federal habeas review. On the state trial and appeal levels of primary concern is the determination of legal guilt or innocence. Review on federal habeas corpus, on the other hand, depends jurisdictionally on a federal constitutional question being presented by the applicant in custody.[119] Constitutional issues may too easily become obscured by

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117. Sofaer, *Federal Habeas Corpus for State Prisioners: The Isolation Principle*, 39 N.Y.U.L. REV. 78, (1964).

118. 394 U.S. at 225, 226, 228.

119.

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court *only* on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. §2254 (a) (1977) (emphasis added).

the emphasis on the determination of guilt at the trial and appellate levels. Recognition of this possibility and the inherent fallibility[120] of men led to the formulation of habeas review of constitutional claims in order to protect more fully these basic tenets upon which our society is grounded. The limited focus of federal habeas corpus, divorced from considerations of guilt, provides a greater likelihood of impartial evaluation and constitutional adherence.

The foregoing discussion discloses that logic and experience do not necessarily warrant a presumption of adequate state adherence to constitutional rights. Simply because the combined social costs of the exclusionary rule and federal habeas review of state judgments are disfavored by a majority of the Court is hardly justification for ignoring the constitutional emphasis of habeas review, the constitutional dimension of the fourth amendment exclusionary rule whatever procedural inadequacies that still may exist in many state court systems, and the contrary holding of *Kaufman*. Certainly, the availability of federal habeas corpus to state prisoners involves an ineffcient expenditure of judicial energy and resources. Yet, this and other equally valid policy concerns should not take precedence over the vindication of constitutional rights.

THE INTERPRETATION OF "FULL AND FAIR LITIGATION"

Stone v. Powell's refusal to grant federal habeas corpus relief to state prisoners on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial is prefaced by an important yet ambiguous proviso. Despite disagreement with the societal effects of federal habeas review and the exclusionary rule, *Stone* holds that where a state has not provided "an opportunity for full and fair litigation of a fourth amendment claim"[121] a state prisoner may still obtain federal relief on that constitutional basis. This exception is important because it furnishes the only acknowledged means to evade the broad proscription of *Stone*. Ascertaining the intended interpretation of the phrase "full and fair litigation" is, however, tenuous.

Mr. Justice Powell did not elucidate the appropriate meaning of the expression "full and fair litigation." The only intimation into the sense of the expression is relegated to a single footnote on the last page of the majority opinion.[122] In the footnote reference is

120. Bator, *supra* note 55, at 453. *Cf.* Kaufman v. United States, 394 U.S. 217, 239 (1969).

121. 428 U.S. at 482, 494. *Cf.* 428 U.S. at 480, 494 n.37.

122. *Id.* at 494 n.36.

made to one case, *Townsend v. Sain*, which is cited as authority "sufficiently analogous to lend some support to the text."[123] Unfortunately *Stone* neglects to explicate the nature of the similarity existing between *Townsend* and the intended interpretation of "full and fair litigation."

At least three different interpretations of the phrase in question might be hypothesized in accordance with the provisions of *Townsend*. The first interpretaton employs the general meaning of the term as used in *Townsend*. The second possible meaning of "full and fair litigation" recognizes the influence of federalism by limiting the power of federal district courts to conduct *de novo* evidentiary hearings on habeas corpus review of a state judgment. The last interpretation stresses the importance of examining the procedural adequacy of state court systems on federal habeas corpus in order to determine whether binding effect should be given the state adjudication of a fourth amendment claim.

Paradoxically, the most unlikely interpretation of "full and fair litigation" is to ascribe it the same general effect as in *Townsend*. The standard formulated for the same expression in that opinion held that

> where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state court trier of fact has after a full hearing reliably found the relevant facts.[124]

Taken as a whole, "full and fair" within the context of *Townsend* referred to the circumstances under which an evidentiary hearing[125] was necessary to resolve disputed facts on federal habeas review. In order to clarify those instances where an independent factual determination was required, the Court outlined six situations in which a state adjudication must be deemed as inadequate and hence an unreliable finding of facts.[126] This set of circumstances, in turn,

123. A UNIFORM SYSTEM OF CITATION 7 (12 ed. 1976).

124. 372 U.S. at 312-13.

125. For the purposes of this note, the terms "litigation," "hearing," and "adjudication" within the context of "full and fair" terminology shall be considered synonomous.

126.

> We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the

served as the blueprint for subsection (d) of 28 U.S.C. §2254,[127] which essentially codifies the effect of *Townsend*. Thus, considering this

merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

372 U.S. at 313.

127.

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merts of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant otherwise appears, or is admitted by the respondent, or numbered (8) that the record in the State court proceeding considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. §2254 (d) (1977).

broad evidentiary sense of "full and fair" in conjunction with the earlier decision of *Brown v. Allen*,[128] one may conclude that:

> [The] obligation of federal habeas courts, once they assume jurisdiction, is to assure all state prisoners a full and fair hearing of their federal claims, and [still] preserve a meaningful rule for state courts in the adjudication of federal rights [in order] to minimize tension. With respect to questions of law, the federal courts have no discretion; their duty is to redetermine all questions of federal law, and to order appropriate relief if it appears the state court incorrectly concluded that no federal right was violated. With repect to disputes concerning the facts underlying federal claims, however, while the federal courts have power to redetermine the facts in all cases, it is their duty to do so only when the state has failed to find the facts after a "full and fair" hearing as defined in *Townsend v. Sain*.[129]

These remarks demonstrate that "full and fair" has sometimes been interpreted as characterizing the entire set of circumstances given expression in *Townsend*, which as a whole determine when an evidentiary hearing is mandatory. In short, the phrase has become synonymous with the conditional categories formulated in that decision. Subsequent decisions have also regarded the entire criteria of *Townsend* as comprising the meaning of the "full and fair" terminology.[130] Although such references attest to the reasonableness of this interpretation, it is unlikely that *Stone* employs the phrase in the same sense.

Construing "full and fair litigation" as merely a shorthand notation for the operation of *Townsend* is not a likely interpretation considering the context of *Stone*, because its supposed restrictive effect upon the exclusionary rule would then have no practical impact upon the viability of fourth amendment claims raised by state prisoners on federal habeas corpus. Insofar as the evidentiary

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128. 344 U.S. 443 (1953).

129. Wright and Sofaer, *supra* note 110, at 849 (footnotes omitted).

130. *See, e.g.*, Sanders v. United States, 373 U.S. 1 (1963), where the court held:

> If issues are involved, the applicant is entitled to a new hearing upon showing that the evidentiary hearing on the prior application was not full and fair; we canvassed the criteria of a full and fair evidentiary hearing recently in *Townsend v. Sain*, and that discussion need not be repeated here.

Id.

categories devised in *Townsend* are largely assimilated into 28 U.S.C. §2254 and that statute now governs the availability and scope of federal habeas review of state convictions, the *Stone* holding could never prohibit the granting of habeas relief solely on the basis of a fourth amendment claim. If the same *Townsend* standards apply both to the "full and fair" exception to *Stone*'s application and §2254, federal habeas review of fourth amendment claims would not differ from other constitutional objections to a state conviction. In either case, if a state did not comply with one of the *Townsend* conditions as embodied in §2254, federal habeas corpus would be available without restrictions since there is no differentiation between constitutional claims in §2254. In effect, adopting the broad *Townsend* interpretation of "full and fair litigation" would make no difference in the analysis of fourth amendment claims involving the exclusionary rule on federal habeas review because §2254 controls the habeas remedy exclusively. This is an unacceptable construction of the "full and fair" provision for it would either directly contravene §2254 or thwart *Stone*'s express objective of limiting the application of the exclusionary rule.

A more reasonable interpretation of "full and fair litigation" would be to construe it as a limitation on the power of federal district courts to conduct *de novo* evidentiary hearings. The thought underlying this meaning of the phrase is that once the state court has completed the initial finding of facts, there is no reason for the federal court to repeat the same task. This approach would be especially persuasive if there is no indication of any inadequacy in the fact-finding procedures utilized by the state court. In this manner, so the proponents of limited federal habeas review assert, a needless source of friction between the federal and state court systems would be eliminated and greater levels of cooperation achieved. Thus, "full and fair" within this context would be interpreted as the finding of facts relevant to a fourth amendment claim by a state court under evidentiary procedures not so seriously defective as to violate constitutional due process as a matter of law. If such reliable facts were found by the state court, then a federal district court on review of defendant's application for habeas corpus relief would be precluded from conducting their own evidentiary hearing.[131] The federal court would be forced to rely upon the state

131. *See* the very thorough article of Wright and Sofaer, *supra* note 110, in which they analyzed the various situations confronting the federal district court in determining whether to accept the state court's findings of fact or to initiate a new evidentiary hearing. They concluded:

> The federal district court's task under *Townsend* is to determine

court's factual determinations, presumably even if unsupported or contradicted by the trial record.

Although the above interpretation might seem a reasonable compromise between the protection provided by federal habeas corpus and the values of federalism, there is reason to doubt its application in *Stone*. If *Stone* had continued to emphasize the social necessity of finality of judgment as in *Schneckloth v. Bustemonte*,[132] then the concept of "full and fair" as a limitation on the availability of *de novo* federal hearings would be strengthened. No such emphasis, however, is present in *Stone*.[133] Of greater significance is the fact that this interpretation would drastically undercut the liberalized circumstances outlined in *Townsend* under which a federal evidentiary hearing is mandated.[134] As a result, one would have to conclude that Mr. Justice Powell mistakenly (or purposely) supported the actual meaning of "full and fair litigation" with precedent that was largely contrary to such an interpretation. Since such a conclusion is improbable, this second explanation of the phrase, although more reasonable than the first, is also doubtful. Any reasonable interpretation must, at least, bear some analogy to the

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whether state courts have made findings of fact upon which the federal claims of state prisoners can properly be reviewed. In handling this task, the court's inquiry should not be whether the state court findings are "correct" in some absolute sense. The district courts should, and *Townsend* requires generally that they must, direct their attention principally to the question whether the conditions under which a challenged finding was made were sufficiently reliable to warrant acceptance of the finding regardless of its correctness in the absolute sense.

In effect, district courts should search for discernible indicia of unreliability, rather than engage in the treacherous process of evidence evaluation. The most significant possible exception to this approach in *Townsend* is the requirement that a hearing be held when the facts found by the state court are not "fairly supported" by the record. This requirement, if broadly interpreted, would entail a full-scale evaluation and weighing of evidence, tending to relegate state court decision-making to a substantially meaningless role. As discussed below, the requirement should therefore be read with a full appreciation of the complexities and uncertainties inherent in reviewing findings of fact, and of the need to preserve a meaningful role for the state courts.

Id.

132. 412 U.S. at 256 (Powell, J., concurring).

133. *Id.* at 256-63 (Powell, J., concurring). The only mention of "finality" in *Stone* is relegated to a footnote concerning countervailing policy considerations in resorting to federal habeas corpus, 428 U.S. at 491 n.31. In contrast to Powell's reliance on the concept in *Schneckloth*, "finality" performs only a minor role in his analysis in *Stone*.

134. *See* Townsend v. Sain, 372 U.S. 293, 311-13 (1963).

rationale of *Townsend*, because that decision is specifically cited as support.

The third and most persuasive defination of "full and fair litigation" does not simply reiterate the effect of *Townsend*, yet still carries some reasonable similarity to that decision. This definition stresses the significance of procedural adequacy in state court systems. The essence of this argument is characterized by the following remarks:

> If it be assumed that the habeas court has power to hear and resolve alleged violations of due process, the argument may still be advanced that due process is not violated when the state has provided an adequate institutional framework for determining guilt and correcting error. This totality-of-process concept is based upon the policy that no more should be demanded of the states than the establishment of adequate processes for the determination of constitutional violations. The habeas court's inquiry would be limited to determining whether such processes exist and the concept would thus serve the interests of Federalism by requiring deference to all reasonable state rules . . . .
>
> The district judge is told to inquire into the adequacy of the state ground—the reasonableness of the state rule—and no further.[135]

Such an interpretation of the "full and fair" language certainly comports with *Stone's* implicit bias toward protection of the integrity and equality of state judgments. Also implicit within this approach is the assumption that state courts are for the most part willing and able to perform the role of watchdog over the constitutional rights of private citizens.[136]

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135. Sofaer, *supra* note 117, at 95.

136. The distinction between the second and third interpretations, although slight, is important and has been essentially characterized in the following remarks.

> If the [second] rule was adopted, our prisoner would prove he was being held in violation of the Constitution as soon as he demonstrated that the state courts had failed to provide him with a resolution of the actual dispute underlying his claim of involuntariness; if the [third] rule were adopted he would have to prove that the failure to render findings of fact was caused by use of the improper procedure. The role of the federal courts would be restricted to determining in the first case whether a finding of fact *was* provided, and in the second case whether the improper procedure had been utilized.

Wright and Sofaer, *supra* note 110, at 908 (emphasis added).

Support for this final alternative meaning can be gleaned from the categories outlined in *Townsend v. Sain*. The third guideline set out in *Townsend* specifies that a federal evidentiary hearing is required when "the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing."[137] The presence of "full and fair" terminology in this evidentiary category of *Townsend* establishes a superficial connection with the expression as used in *Stone*.[138] Likewise, the reference to adequacy of state fact-finding procedures makes it reasonable to presume that the subject matter of the third *Townsend* category is not unlike the "totality-of-process perspective introduced above. The procedural adequacy interpretation of "full and fair litigation" could thus provide a satisfactory explanation for the analogous support that Mr. Justice Powell finds within *Townsend*.

In addition, the terms immediately preceding the "full and fair" language buttress the procedural definition as the only means now available to gain federal habeas review of a fourth amendment claim. The full expression reads "that where the State has provided an opportunity for full and fair litigation of a fourth amendment claim,"[139] there is no constitutional necessity to grant federal habeas relief to a state prisoner asserting infringement of the exclusionary rule. Note that *Stone* does not assert that the state must in fact provide a full and fair litigation, rather just an opportunity for such. The inclusion of the terms "provided an opportunity" are significant, because they demonstrate that the state court system need not actually consider the defendant's fourth amendment claim in order for the prohibition of federal habeas relief still to apply. As a result, the state's only obligation under the *Stone* rationale is the establishment of a satisfactory procedural framework that will, if utilized, reliably resolve fourth amendment claims. If such a procedural arrangement does exist within the state, the requisite opportunity has been provided, and state judgments are then insulated from any federal collateral attack based upon the admission of unconstitutionally obtained evidence. Therefore, the additional terms prefacing "full and fair litigation" reinforce the "totality-of-process" interpretation.[140] An examination of the factual situations presented in

137. 372 U.S. at 313.

138. The sixth guideline also contains the phrase "full and fair fact-finding." However this reference simply restates the general *Townsend* standard without any additional clarification. Mr. Justice Warren apparently intended it as a catch-all clause. *See* 372 U.S. at 317-18.

139. 428 U.S. at 482, 494 & n.37.

140. *See* note 173 *supra* and accompanying text.

Stone and its companion case, *Wolff v. Rice*,[141] also tends to support the procedural adequacy argument.

The defendant Powell was convicted in state court partially upon the basis of evidence which had been discovered in a search pursuant to his violation of a local vagrancy ordinance in another state. The evidence was admitted by the trial court over his objection to the constitutionality of the vagrancy ordinance. After affirmance by a state appellate court on the basis of harmless constitutional error,[142] the defendant's petition for state habeas corpus relief was denied by the state supreme court. The defendant then filed application for federal habeas corpus on grounds that the evidence should have been excluded because it was obtained in an illegal search. He argued that his arrest was unlawful because the ordinance was unconstitutionally vague and therefore any search incident to it invalid. The district court affirmed Powell's conviction on a variety of bases, but the court of appeals reversed on the constitutional issue finding support for the vagueness contention in an earlier Supreme Court decision.[143]

The significant aspect in the Supreme Court's review of *Stone's* conviction is the lack of any consideration of the merits. Despite the apparent viability of the vagueness objection to the vagrancy ordinance,[144] the *Stone* majority was satisfied that the defendant had been accorded sufficient opportunity to press his constitutional claim in the state court system. Obviously, the mere fact that a state court has considered and decided an issue does not in itself attest to the procedural adequacy of the state as a whole. Yet, on the basis of a trial record, appellate review, and provision for state habeas corpus relief, one could reasonably infer, as did this Court, that adequate state procedures did exist for the reliable determination of constitutional claims. Whatever the merits of the defendant's fourth amendment claim, the state had fulfilled its obligation under this interpretation of the exception to *Stone* by maintaining procedures that should be capable of identifying and ultimately deciding constitutional issues.

The companion case, *Wolff v. Rice*, exhibits the same provisional support for the "totality-of-process" interpretation. Defendant

141. 428 U.S. 465 (1976).

142. *See* note 63 *supra*.

143. Papachristo v. City of Jacksonville, 405 U.S. 156 (1972). *See* 428 U.S. at 471 n.2.

144. *Id.*

Rice was convicted of murder in a state court on the basis of the implicating testimony of an accomplice and corrobative evidence seized in a search of defendant's house pursuant to a search warrant. The state supreme court affirmed the conviction deciding that the warrant had been validly issued. However, upon petition for a writ of federal habeas corpus, the district court concluded that the evidence underlying Rice's conviction had been unconstitutionally obtained because of a defective affidavit in support of the search warrant. The court of appeals affirmed the district court's holding and the Supreme Court granted certiorari. Once again, the majority did not examine the merits of the constitutional controversy surrounding the validity of the search warrant, but neither did it explicitly consider the adequacy of the state procedures involved. One can only assume that on the basis of the record the Court found the state procedures to have provided a fair adjudication of the constitutional issue. Although the resolution of the factual situations in *Stone* does not conclusively support any particular interpretation of "full and fair litigation," the absence of any treatment of the merits suggests the compatibility of the "totality-of-process" approach.

The "totality-of-process" interpretaion of "full and fair litigation" still represents a marked departure from the broad availability of federal habeas corpus relief to state prisoners asserting fourth amendment claims. No longer will the focus of habeas review center on the viability of the constitutional issue tendered, but rather on the procedural protection afforded the prisoner by the state. What may be most disquieting, if *Stone* is to be considered the paradigm for subsequent decisions, is the superficiality of the procedural adequacy necessary to satisfy the requirement of a "full and fair" adjudication. Without discussing the matter, the *Stone* majority apparently presumed on the basis of the state record and procedural framework[145] that each state had provided a just and impartial adjudication of the constitutional issue. Virtually any state conviction collaterally attacked by a prisoner on federal habeas corpus could meet such minimum requirements of due process. If federal habeas applications by state prisoners asserting fourth amendment infringements are now to be evaluated merely as to whether the trial court considered the constitutional claim and preserved it for state appellate review, then the historic power and duty of federal district courts to ensure individual constitutional rights have been drastically weakened.[146] Recognition of this fact leads one to query the con-

145. *See* pp. 131-33.

146. *See* note 134 *supra*.

tinued vitality of *Townsend* and its evidentiary guidelines for federal habeas fact-finding.

As the preceding paragraphs have detailed, *Stone v. Powell* may have analogized support for its conclusion by elevating the significance of the procedural adequacy aspect of *Townsend*. The fundamental premise implicit throughout all the *Townsend* guidelines is the obligation of a federal court on habeas corpus to breach the state's procedural framework in order to ensure that relevant facts have been reliably found.[147] This basic federal responsibility is at odds with the "totality-of-process" perspective, which would restrict federal habeas review solely to an examination of whether there are state procedures reasonably calculated to ascertain constitutional violations. Whereas *Townsend* stressed the substantive aspect of fact-finding, the "totality-of-process" concept underscores the existence of typically reliable fact-finding procedures. Hence, the *Stone* decision could be accurately characterized as emphasizing formal processes to the exclusion of any independent federal fact-finding absent a showing of unreasonably inadequate state procedure. This procedural approach to the scope of federal habeas review of state convictions seems, therefore, incompatible with the holding of *Townsend*, despite the reference to its analogous support.

Assuming the presence of reasonably adequate procedures, *Stone v. Powell* might also require the recognition of a state court's legal as well as factual conclusions. Nowhere in *Stone* are legal findings exempted from the deference accorded state adjudications of fourth amendment claims once the prisoner's "opportunity for a full and fair litigation" has been established. Thus, a federal court reviewing a state conviction on habeas corpus might now have to ratify a state court's legal determinations of fourth amendment issues despite the misinterpretation of constitutional standards.[148] This result again deviates from the holding of *Townsend* which remarked upon a prior decision[149] that

> [a]lthough the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of

147. *See* notes 126 & 134 *supra*, Fay v. Noia, 372 U.S. 391 (1963).

148. *See* note 131 *supra*. Several lower federal courts have in fact decided that the correct interpretation of constitutional rights at the state level is irrelevant under the *Stone* "full and fair" standard. *See, e.g.*, Holmberg v. Parrat, 548 F.2d 745, 746 (8th Cir. 1977); Tisnado v. United States, 547 F.2d 452, 455 n.2 (9th Cir. 1976).

149. Brown v. Allen, 344 U.S. 443 (1953).

> law. It is the district judge's duty to apply the applicable federal law to the state court fact-findings independently. The state conclusions of law may not be given binding weight on [habeas review] . . . .[150]

The "totality-of-process" approach also seems certain to abridge the "exhaustion" doctrine as enunciated in *Fay v. Noia*. One of the conditions that must be satisfied before a state prisoner can be granted federal habeas relief is the exhaustion of state remedies.[151] *Noia* interpreted this requirement to mean that the state prisoner must exhaust only those state remedies still presently available to him at the time of application for federal habeas review.[152] Hence, a state prisoner who had inadvertently forfeited a prior procedural remedy under state law was not barred from obtaining federal relief. The "totality-of-process" interpretation of "full and fair litigation" in *Stone*, however, is only concerned with the availability of such state procedures. As long as the petitioner has had the opportunity at any time to adequately present his objection to the admission of unconstitutionally obtained evidence the state would seem to have fulfilled its obligation under the *Stone* rationale. If the state prisoner, therefore, neglected to avail himself of the opportunity to assert the fourth amendment claim at the state level, he cannot then collaterally attack the state judgment on that constitutional basis in the federal court.[153] This forfeiture of federal relief would follow irrespective of whether additional state remedies are still presently available. Such a procedural restriction directly contravenes the purpose of *Noia* in ensuring that:

> [F]ederal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state proceedings. State procedural rules plainly must yield to this overriding federal policy.[154]

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150. 372 U.S. at 318.

151. An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

28 U.S.C. §2254 (b) (1977).

152. 372 U.S. at 434-35.

153. *Cf.* note 155 *supra*, which considers the recent case Wainwright v. Sykes, ___ U.S. ___ 97 S.Ct. 2497 (1977).

154. 372 U.S. at 426. Although Mr. Justice Powell reassures that the *Stone* "decision does not mean that the federal court lacks jurisdiction over such a fourth

For the same reasons as above, the forfeiture of federal habeas relief would also occur regardless of whether the defendant "deliberately bypassed"[155] the state procedural ground, as that waiver requirement was defined in *Noia*.

From the foregoing analysis, one might be justified in concluding that *Fay* v. *Noia* will also no longer be followed by the present Supreme Court. *Noia* clearly established that "the jurisdiction of the federal courts on habeas corpus is not affected by procedural defaults incurred by the applicant during the state court proceedings."[156] In reaching this conclusion, the Court rejected as unsound,

> the suggestion that the federal courts are without power to grant habeas relief to an applicant whose federal claims would not be heard on direct review in this court because of a procedural default furnishing an adequate and independent ground of state decision.[157]

Stone certainly purports to affect the power of federal courts to grant habeas relief to state prisoners who assert fourth amendment claims based on a state's denial of the exclusionary rule. This leads one to suspect that *Stone* may be the beginning of an attempt to

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amendment claim," 428 U.S. at 495 n.38, it is difficult to reconcile this statement with the practical result to a habeas applicant. Federal habeas review is immediately blocked upon the showing of an opportunity for a full and fair state hearing even if on the court's own motion. At least one lower federal court has disputed the jurisdictional statement of Justice Powell. *See* O'Berry v. Wainwright, 546 F.2d 1204, 1211 (5th Cir. 1977).

155. After this note was written the Supreme Court decided Wainwright v. Sykes, ____ U.S. ____, 97 S.Ct. 2497 (1977), which abolished the "deliberate bypass" standard for *Miranda* claims that should be raised at the trial level according to procedural law. In its place the Court substituted the "cause and prejudice" test originally formulate in Davis v. United States, 411 U.S. 233 (1973), and applied in Francis v. Henderson, 425 U.S. 536 (1976). In order to obtain federal habeas review a state prisoner must now show cause for his failue to comply with the state contemporaneous objection rule and actual prejudice resulting from the constitutional violation. What effect *Sykes* will have on like claims that must be raised at or before the state trial remains to be seen. Also uncertain is the extent to which Fay v. Noia, 372 U.S. 391 (1963), survives this recent holding. In any case, *Sykes* poses another obstacle for the state prisoner to clear before gaining federal habeas review.

To the extent that the *Sykes* decision emphasizes the fairness and adequacy of the state contemporaneous objecton rule, it is consistent with the "totality of process" interpretation although there was no reference in that case to the "full and fair" standard. *Stone v. Powell* is unaffected since both petitioners had pressed their fourth amendment claims at the state level.

156. 372 U.S. at 438.

157. *Id.* at 434.

resurrect the "adequate and independent state ground" justification for restricting the scope of federal habeas review as well as federal direct review.[158] When considered in conjunction with other recent decisions regarding the scope of federal habeas corpus, this appears even more likely.[159]

Subsequent Decisions Applying the Stone Rationale

Joint dissatisfaction with both the fourth amendment exclusionary rule and the ongoing availability of federal habeas corpus for state prisoners is largely confirmed by a subsequent Supreme Court decision as the most probable motivation underlying the *Stone* v. *Powell* opinion. This reasoning would seemingly inhibit like restrictions upon other constitutional rights asserted by state prisoners on federal habeas corpus. Such has been the case so far.

In *Brewer* v. *Williams*,[160] the Supreme Court was confronted with the question whether a state prisoner's fifth and sixth amendment rights on federal habeas review would be similarly conditioned upon the procedural adequacy afforded him by the state. Considering only the sixth and fourteenth amendment right to counsel, a bare majority[161] of the Court held that incriminating statements made by the defendant while in transit to the station without the presence of counsel were unconstitutionally obtained and excludable. Mr. Justice Stewart, writing for the majority, held that,

> the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him.[162]

The Court determined that judicial proceedings had commenced against the defendant prior to the statements on the basis of the warrant for his arrest, arraignment, and confinement in jail. The majority opinion also found no waiver of his right to assistance of

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158. *See, e.g.*, Wainwright v. Sykes, ___ U.S. ___, 97 S.Ct. 2497, 2503-509 (1977). For an excellant discussion as to how the "full and fair" standard relates to the adequate and independent state ground, see O'Berry v. Wainwright, 546 F.2d 1204, 1216-18 (5th Cir. 1977).

159. *See, e.g.*, Wainwright v. Sykes, ___ U.S. ___, 97 S.Ct. 2497 (1977); Frances v. Henderson, 425 U.S. 536 (1976); Estelle v. Williams, 425 U.S. 501 (1976).

160. ___ U.S. ___, 97 S.Ct. 1232 (1977).

161. Four members of the Court, Mr. Chief Justice Burger, Mr. Justice White, Mr. Justice Blackman, and Mr. Justice Rehnquist dissented to the majority opinion.

162. ___ U.S. ___, 97 S.Ct. 1232, 1239 (1977).

counsel. The *Brewer* decision thus appears to resist any further expansion of the *Stone* argument.

Although Mr. Justice Powell, author of the *Stone* decision, formed part of the majority in *Brewer*, he wrote a concurring opinion in which he expressed his thoughts on the applicability of the *Stone* rationale to other constitutional rights. Alluding to consideration of "the integrity of the fact-finding process,"[163] which did not play a large part in the *Stone* decision,[164] Justice Powell preferred not to venture an opinion at this early stage. He may, therefore, still represent the swing vote in future cases which confront the further extension of the *Stone* argument—a fact which did not escape the attention of the *Brewer* dissenters.[165]

At any rate, like excursions into the applicability of other constitutional rights on federal habeas review of state convictions will probably turn more upon dissatisfaction with the particular right involved than upon the interest of federalism, which continues to exert dominant influence in recent decisions.[166] Whereas comity and federalism remain constants in the consideration of any federal habeas petition, constitutional rights are presumably variables distinguishable according to the social costs which each incurs. Those rights which on balance approach or surpass the level of social disadvantage engendered by the fourth amendment are most threatened by the *Stone* rationale.[167] The *Brewer* Court's refusal to consider the petitioner's fifth amendment claim leaves the door to further restrictions on federal habeas corpus slightly ajar.

Perhaps of greater importance is the impact of *Stone* upon lower federal courts, which remain the real battlegrounds of federal habeas review. Inasmuch as the Supreme Court has removed fourth amendment claims from consideration if the forum state has provided an opportunity for a full and fair hearing, most federal court decisions have understandably centered on whether such was afforded

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163. *Id.* at 1247 (Powell, J., concurring).

164. The only portion of the *Stone* majority opinion to consider "the integrity of the fact-finding process" is in reference to Mr. Justice Black's dissent to the Kaufman decision, see 428 U.S. at 490. There was greater emphasis upon the truth finding process in Mr. Justice Powell's concurrence to Schneckloth v. Bustamonte, 412 U.S. at 250.

165. ___ U.S. ___, 97 S.Ct. 1232, 1254 (Burger, C. J., dissenting).

166. *See, e.g.*, Wainwright v. Sykes, ___ U.S. ___, 97 S.Ct. 2497 (1977); Juidice v. Vail, ___ U.S. ___, 97 S.Ct. 1211 (1977).

167. For possible examples of such constitutional rights, see 428 U.S. at 517-18 and the text accompanying notes 174-77 *infra*.

the state prisoner. Unfortunately, few federal district or circuit courts have adequately analyzed the concept before application.[168] Rather most have either presumed the *Townsend* criteria still to be the standards by which to evaluate the adequacy of state convictions or unquestionably accepted the state record as conclusive of the fact.[169] Fewer still have elaborated on what constitutes denial of the right to a full and fair hearing at the state level.[170]

Most lower federal courts have quite naturally utilized the *Stone* standard as a means to avoid any consideration of fourth amendment claims on federal habeas review of state convictions.[171]

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168. At the present time only one lower federal court has fully analyzed the "full and fair" standard, O'Berry v. Wainwright, 546 F.2d 1204 (5th Cir. 1977).

169. The following cases have applied the *Townsend* criteria to the interpretation of the "full and fair" standard: Hines v. Auger, 550 F.2d 1094 (5th Cir. 1977); Nordskog v. Wainwright, 546 F.2d 69 (5th Cir. 1977); Curry v. Garrison, 423 F.Supp. 109 (W. D.N.C. 1976).

Cases which examined the state record in order to evaluate the adequacy of the state proceedings without reference to the *Townsend* criteria include: Kahn v. Flood, 550 F.2d 784 (2nd Cir. 1977); Cole v. Estelle, 548 F.2d 1164 (5th Cir. 1977); Holmberg v. Parratt, 548 F.2d 745 (8th Cir. 1977); Talavera v. Wainwright, 547 F.2d 1238 (5th Cir. 1977); Stocker v. Hutto, 547 F.2d 437 (8th Cir. 1977); Nordskog v. Wainwright, 546 F.2d 69 (5th Cir. 1977); Stinson v. State of Alabama, 545 F.2d 485 (5th Cir. 1977); Tisnado v. United States, 547 F.2d 452 (9th Cir. 1976); Williams v. State of Ohio, 547 F.2d 40 (6th Cir. 1976); United States ex. rel. Placek v. State of Illinois, 546 F.2d 1298 (7th Cir. 1976); United States ex rel. Saiken v. Bensinger, 546 F.2d 1292 (7th Cir. 1976); Marchese v. State of California, 545 F.2d 645 (9th Cir. 1976); Flood v. State of Louisiana, 545 F.2d 460 (5th Cir. 1976); Chavez v. Rodriquez, 540 F.2d 500 (10th Cir. 1976); George v. Blackwell, 537 F.2d 833 (5th Cir. 1976); Wright v. Wainwright, 537 F.2d 224 (5th Cir. 1976); United States ex rel. Williams v. State of Delaware, 427 F.Supp. 72 (D. Dela. 1976); United States ex rel. Conray v. Bombard, 426 F.Supp. 97 (S.D.N.Y. 1976); Hughes v. State of California, 426 F.Supp. 36 (W.D. Okla. 1976); Bellew v. Gunn, 424 F.Supp. 31 (N.D. Calif. 1976); United States ex rel. Tirado v. Bombard, 423 F. Supp. 1245 (N.D.N.Y. 1976); Palmer v. Zahradnick, 423 F.Supp. 130 Va. 1976); Richardson v. Stone, 421 F.Supp. 577 (N. D. Calif. 1976); Perry v. Vincent, 420 F.Supp. 1351 (E.D.N.Y. 1976); Losinno v. Henderson, 420 F.Supp. 380 (S.D.N.Y. 1976).

170. *See* Curry v. Garrison, 423 F.Supp. 109 (W.D.N.C. 1976); United States ex rel. Petillo v. State of New Jersey, 418 F.Supp. 686 (D.N.J. 1976).

171. *See* Hines v. Auger, 550 F.2d 1094 (8th Cir. 1977); Kahn v. Flood, 550 F.2d 784 (2nd Cir. 1977); Cole v. Estelle, 548 F.2d 1164 (5th Cir. 1977); Holmberg v. Parratt, 548 F.2d 745 (8th Cir. 1977); Talavera v. Wainwright, 547 F.2d 1238 (5th Cir. 1977); Stocker v. Hutto, 547 F.2d 437 (8th Cir. 1977); O'Berry v. Wainwright, 546 F.2d 1204 (5th Cir. 1977); Nordskog v. Wainwright, 546 F.2d 69 (5th Cir. 1977); Stinson v. State of Alabama, 545 F.2d 485 (5th Cir. 1977); Tisnado v. United States, 547 F.2d 452 (9th Cir. 1976); Williams v. States of Ohio, 547 F.2d 40 (6th Cir. 1976); United States ex rel. Placek v. State of Illinois, 546 F.2d 1298 (7th Cir. 1976); Marchese v. State of California, 545 F.2d 645 (9th Cir. 1976); Flood v. State of Louisiana, 545 F.2d 485 (5th Cir. 1976); Rigsbee v. Parkinson, 545 F.2d 56 (8th Cir. 1976); Corley v. Cardwill, 544 F.2d 349 (9th Cir. 1976); Redford v. Smith, 543 F.2d 726 (10th Cir. 1976); White v. State of Alabama, 541 F.2d 1092 (5th Cir. 1976)(remanded); Roach v. Parratt, 541 F.2d 772 (8th

In this sense, the decision has accomplished its objective of minimizing federal review of fourth amendment claims. Yet, many of these same courts now devote as much or even greater consideration to the question of whether the forum state has "provided an opportunity for a full and fair hearing."[172] Thus, the time and energy that might have previously been spent in evaluating the merits of a habeas petitioner's claim is now concentrated exclusively on the adequacy of the corrective processes provided by the state. A few decisions have recognized the impact of the opportunity aspect of the *Stone* formula and have held that even erroneous findings of the state court are immaterial and do not necessarily require federal review.[173] Most federal courts, however, have continued to evaluate the adjudicative history of each applicant so as to determine whether the full and fair standard has actually been met.

There has also been less reluctance on the part of district courts to extend the *Stone* rationale to additional constitutional claims. Citing *Stone* as persuasive authority, several decisions have applied a similar social cost-benefit analysis to exclude from federal habeas review of state convictions claims such as questionable identification procedures under the fourteenth amendment,[174] *Miranda* violations,[175] and illegal wiretapping.[176] At least three courts,

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Cir. 1976); Bracco v. Reed, 540 F.2d 1019 (9th Cir. 1976); Caver v. State of Alabama, 537 F.2d 1333 (5th Cir. 1976) (remanded); Wright v. Wainwright, 537 F.2d 224 (5th Cir. 1976); George v. Blackwell, 537 F.2d 833 (5th Cir. 1976); United States ex rel. Williams v. State of Delaware, 427 F.Supp. 72 (D. Dela. 1976); United States ex rel. Conray v. Bombard, 426 F.Supp. 97 (S.D.N.Y. 1976); Hughes v. State of California, 426 F.Supp. 36 (W.D. Okla. 1976); Bellew v. Gunn, 424 F.Supp. 31 (N.D. Calif. 1976); United States ex rel. Tirado v. Bombard, 423 F.Supp. 1245 (S.D.N.Y. 1976); Palmer v. Zahradnick, 423 F.Supp. 130 (E.D. Va. 1976); Richardson v. Stone, 421 F.Supp. 577 (N.D. Calif. 1976); Denti v. Commissioner of Correctional Services, 421 F.Supp. 557 (S.D.N.Y. 1976); Perry v. Vincent, 420 F.Supp. 1351 (E.D.N.Y. 1976); Losinno v. Henderson, 420 F. Supp. 380 (S.D.N.Y. 1076); Pulver v. Cunningham, 419 F.Supp. 1221 (S.D.N.Y. 1976).

172. *See, e.g.*, O'Berry v. Wainwright, 546 F.2d 1204 (5th Cir. 1977); United States ex rel. Conray v. Bombard, 426 F.Supp. 97 (S.D.N.Y. 1976).

173. The following cases are in accord with the "totality-of-process" interpretation of the full and fair standard inasmuch as they emphasize the opportunity aspect of the state proceedings: Hines v. Auger, 550 F.2d 1094, 1097 (8th Cir. 1977); Holmberg v. Parratt, 548 F.2d 745, 746 (8th Cir. 1977); O'Berry v. Wainwright, 546 F.2d 1204, 1213-14 (5th Cir. 1977); Tisnado v. United States, 547 F.2d 452, 455 n.2 (9th Cir. 1976); Denti v. Commissioner of Correctional Services, 421 F.Supp. 557 (S.D.N.Y. 1976); Pulver v. Cunningham, 419 F.Supp. 1221, 1224 (S.D.N.Y. 1976).

174. Szaraz v. Perini, 422 F.Supp. 8 (N.D. Ohio 1976).

175. Richardson v. Stone, 421 F.Supp. 577 (N.D. Calif. 1976).

176. United States ex rel. Conray v. Bombard, 426 F.Supp. 97 (S.D.N.Y. 1976); Zagarino v. West, 422 F.Supp. 812 (E.D.N.Y. 1976).

however, have refused to expand *Stone* to allegations of double jeopardy.[177]

CONCLUSION

In *Stone* v. *Powell* a majority of the Supreme Court brought federal habeas review of state convictions into line with the principles of federalism, comity, and abstention that have influenced many other recent decisions. In so doing it ignored the historic justifications of the fourth amendment exclusionary rule in favor of the questionable deterrent function of the rule. The "full and fair hearing" standard that was announced in *Stone* as the limiting factor to obtaining federal habeas review seems destined as yet another vague and ambiguous notion upon which various courts can place differing or even contradictory interpretations. For this reason, the "full and fair" concept is a poor standard by which to evaluate when deference to state findings is required. If the *Townsend* criteria are presumed dispositive of the *Stone* standard, as many federal decisions have subsequently held, then fourth amendment claims are still subject to the same habeas review as other constitutional claims under §2254. Since such a result is clearly contrary to Mr. Justice Powell's stated objective in *Stone* of limiting review of fourth amendment claims, a more likely interpretation would place greater emphasis upon the procedural adequacy of the forum state. Under the "totality-of-process" approach, which has been affirmed by several federal courts as the appropriate interpretation of "full and fair," it is clear that a state prisoner no longer has a right to have his fourth amendment claim decided correctly, but rather only the right to have an opportunity to present it before a state tribunal.

177. *See* Greene v. Masser, 546 F.2d 51 (5th Cir. 1977); Corley v. Cardwell, 544 F.2d 349 (9th Cir. 1976); Sedgwick v. Superior Court of Dist. of Columbia, 417 F.Supp. 386 (D.D.C. 1976).